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In the

Supreme Court of the United States

OCTOBER TERM, 1973

BEATRICE FOODS CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable Warren E. Burger, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Beatrice Foods Co. respectfully petitions for a writ of certiorari to review a summary judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported in CCH 1974 Trade Cases, ¶74,948, but has not yet been officially reported.

The opinions of the United States District Court for the District of Minnesota are reported at 344 F. Supp. 104 (summary judgment) and at 351 F. Supp. 969 (penalties and divestiture). (Appendices B and C, respectively)

The Initial Decision of the FTC Hearing Examiner (Appendix D) filed March 2, 1964 is reported at 67 FTC 481, the order appearing at pages 695 and 696.

The original Final Order of the Federal Trade Commission (Appendix E), filed December 10, 1965, is reported at 68 FTC 1003.

The Final Decree as modified by consent (Appendix F) entered by the United States Court of Appeals for the Ninth Circuit on May 23, 1967 is reported at CCH Trade Cases 1967, ¶72,124.

The Statement and Modified Order of the Federal Trade Commission (Appendix G) entered on June 7, 1967, pursuant to the decree of the Court of Appeals for the Ninth Circuit, is reported at 71 FTC 800.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals (Appendix A) was entered on March 8, 1974. Section 1254(1) of Title 28 of the United States Code is believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a firm, assumed to have violated a Federal Trade Commission modified consent order prohibiting acquisitions, is subject, under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45(*l*)), to the imposition of a single acquisition penalty (as held by the Tenth Circuit Court of Appeals in *United States* v. *ITT Continental Baking Company,* now pending in this court as No. 73-1290), or to the imposition of penalties for each day it continues to hold such acquisition (as held by the Eighth Circuit Court of Appeals in this case).

(2) Whether, in interpreting the modified consent decree, the Court of Appeals (contrary to the holdings of three other Circuit Courts of Appeals) erred in rejecting consideration of prior negotiations and concessions by the Federal Trade Commission, and further erred in rejecting consideration of the Federal Trade Commission's own interpretation of the modified consent decree after its entry, thus deciding that issue in conflict with the applicable decision of this court in *United States* v. *Atlantic Refining Company.*

(3) Whether, it should not have been evident that there were genuine issues of material fact precluding entry of summary judgment and requiring a trial.

(4) Whether, in any event, the Court of Appeals erred in not recognizing the sharp difference between the proscription against acquisition of "stock, share capital or assets" of another dairy, as contained in the original order, and the narrower prohibition against acquisition

of an "interest in" another dairy, as contained in the modified consent decree entered after years of negotiations on the point.

(5) Whether the Court of Appeals erred in holding that petitioner had acquired an "interest in" Maple Island Dairies, Inc., thus deciding that issue in conflict with the applicable decision of this court in United States v. Armour & Co.; and whether it proceeded beyond its authority or committed further error in ordering divestiture of such "interest"—an act impossible of accomplishment since petitioner does not now, and never has had, such an interest.

(6) Whether, when the Commission abandoned the requirement of divestiture of all Beatrice's southwestern plants to a single purchaser, Beatrice should not have been entitled to reasonable additional time to dispose of a minority stock interest in a family-owned dairy firm.

STATUTES INVOLVED

Section 11(*l*) of the Clayton Act (38 Stat. 734, as amended, 15 U.S.C. 21(*l*)) provides:

> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 5(*l*) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(*l*)) provides:

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

STATEMENT OF THE CASE

In 1956 the Federal Trade Commission filed a complaint against this petitioner (Beatrice) charging 175 illegal acquisitions (App. G1). After almost eight years of protracted hearings and negotiations the hearing examiner's decision, filed March 2, 1964 (App. D1) dismissed all but five of the charges. On December 10, 1965, the Commission entered a final order which sustained the examiner in requiring divestiture on the ground that Beatrice had illegally acquired *"the stock, share capital or assets"* of the five companies which were located at Greenbrier, West Virginia; Missoula, Montana; Honolulu, Hawaii; Boise, Idaho; and Salt Lake City, Utah (App. E1, 2). (Soon thereafter the assets of one of these companies were destroyed by a tidal wave.) The Commission also ordered Beatrice to cease and desist for ten years from acquiring *"the stock, share capital, or assets"* of any other dairy (App. E3).

Beatrice, not accepting this result, appealed to the Court of Appeals for the Ninth Circuit where matters

were held in abeyance during more than a year of further negotiations. Finally, in order to reach a compromise, the Commission submitted a proposal which was agreed to, essentially incorporating the points which had been pressed by Beatrice for almost ten years (App. 968), and Beatrice was advised by the Commission that the term "interest in" was less restrictive than the former language (App. 969). It was presented to the Court of Appeals for approval as a consent decree and entered May 23, 1967 (App. F). The Court directed the Commission to modify its previous order to conform to the Court's consent decree and this was done on June 7, 1967 (App. G6-9).

There were two critical differences between the original Commission Order and the modified decree with which we are now concerned:

First, instead of divesting the four widely scattered plants found to have been illegally acquired, Beatrice agreed to divest itself of a larger number of plants plus an 18-½% stock interest held by Beatrice in the corporate owner of another plant, all so located geographically in the southwest (West Texas, New Mexico, Arizona, southern California, southern Nevada and southern Utah) that they were "capable of being sold as a single property to a single company." (Commission Statement, App. G2). In addition, Beatrice agreed to dispose of a plant in Morgantown, West Virginia (to a separate purchaser) and all these divestitures were incorporated by consent in the modified order in lieu of those covered by the original order. As stated, the modified order applied to "plants", "not dairies," and there was no claim by the Commission that any of these properties had been unlawfully acquired, the statements in the opinion of the Court of Appeals to the contrary notwithstanding (App. A3).

Beatrice obtained a purchase offer for one of the southwestern plants plus the minority stock interest, but it was rejected by the Commission, which stood on the proposition of a single purchaser. The Morgantown plant was sold and a purchaser for the southwestern plants was then obtained for all but the minority stock interest. This time the sale was approved by the Commission in January, 1969. Despite the abandonment at that late date of the single-purchaser concept, the Commission advised Beatrice on March 6, 1969 that it must nevertheless dispose of its minority stock holding, even though the Commission recognized the difficulty of sale since the family owning the closely held majority stock would be the only potential purchaser. Nevertheless, this was accomplished about nine months later, being only seven weeks beyond the date set by the Commission for such divestiture.

Second, and most important, the prohibition in the original order against acquisition of "*the stock, share capital, or assets*" of another dairy,* was changed in the modified consent decree to a prohibition against the acquisition of any "*interest in*" another dairy. It is this provision which involves the principal dispute between the parties and concerns the relationship between Beatrice and Maple Island Dairies, Inc. (Maple).

Maple was, and still is, a dairy firm operating through distributors in Minnesota, but it did not process its own milk and purchased some of its needs from Beatrice. In 1968 Maple concluded that the business done in its Northern Division was so unprofitable as not to justify its continuance (App. 844, 850). Before terminating its sales

* Which provision had been agreed to by three Beatrice competitors: National Dairy Products Co., 62 FTC 120 (1963); Borden Company, 62 FTC 130 (1963); and Foremost Dairies, Inc., 67 FTC 282 (1965).

in that territory, however, it sought to obtain a continuing supply of dairy products for its distributors who had demonstrated loyalty to Maple over many years (App. 850). It made unsuccessful attempts to interest two other dairies in the undertaking and then opened negotiations with Beatrice representatives who made it clear at the outset that Beatrice was prohibited from purchasing any interest in Maple's dairy business, and the Maple representative recognized that fact (App. 851, 852).

Arrangements were eventually made whereby Maple would convert its eleven employee-distributors to independents; that all its distribution would then be through 22 independent distributors,** that if any of the distributors, *at their exclusive option,* wished to buy products from Beatrice they could do so; that in those cases Beatrice would assist on a reasonable basis with loans to enable the distributors to pay off the loans previously received from Maple for the purchase of assets and equipment, and to enable them to purchase accounts receivable from Maple. Notes and any security documents would be assigned by Maple to Beatrice. The original 11 independent distributors owned their own facilities and owed Maple for only their 30-day trade accounts.

Between September and December, 1968, the above arrangements were carried out with respect to 13 of the 22 then independent distributors of Maple. Beatrice purchased no assets of Maple and none of the trucks or other equipment being purchased by the distributors was assigned to Beatrice (App. 1437-1445). Beatrice became a creditor of those distributors who made loans, all of which have either been repaid in full or remained current.

** Disposition of four Maple stores is not involved in this case.

(App. 763, 269) Of the original 22 distributors of Maple, five chose not to do any business with Beatrice, one ceased doing so within a year, and eight others have since changed suppliers, leaving twelve currently serviced by Beatrice.

All Beatrice distributors who were former distributors of Maple and who purchased assets and accounts receivable from Maple, have the following common characteristics:

(a) Each operates a sole proprietorship, no one else owning any part of the business or having any voice in its operations.

(b) Each retains whatever profits may be generated and is solely responsible for losses.

(c) Each who was financed by Beatrice individually assumed personal liability for the loans referred to, signing documents evidencing both debt and security, and Maple ceased to have any interest in any of the items purchased.

(d) Maple having granted to Beatrice the right to use the Maple label, each distributor had the option to use it and did so. (App. 244-5, 268-70, 282, 290-91, 294, 307-8, 357, 367, 369, 370, 409-412)

On October 23, 1970 the Government filed a Complaint in two counts against Beatrice in the U.S. District Court for Minnesota (App. 6), alleging in Count I that Beatrice, in violation of the modified consent decree had acquired an "interest in Maple Island Dairies, Inc.," and in Count II alleging that Beatrice had been seven weeks late in divesting itself of its minority stock interest in Valley Gold Dairies. Answer was filed and dozens of depositions, interrogatories, and exhibits were filed by both

parties, including potential evidence as to statements and actions of both the Commission and Beatrice with respect to their interpretation of the critical language of the modified consent decree, both before and after its entry.

On November 5, 1971, the Government filed a motion for summary judgment as to liability which was allowed by the Court on June 16, 1972 (App. B). On December 26, 1972, the Court imposed fines of $200 per day ($156,400 under Count I and $9,800 under Count II) and also entered a divestiture order with respect to Count I (App. C).

Beatrice appealed and on March 8, 1974 the Court of Appeals for the Eight Circuit affirmed the trial court (App. A).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) In this case, the Court of Appeals for the Eighth Circuit, in imposing the penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45 (*l*)), set forth in full above, decided that the violation of a proscribed acquisition authorizes a continuing daily penalty so long as such acquisition is held. Without conceding that Beatrice did acquire an "interest in" Maple, we submit that this is an erroneous interpretation of the statutory language, "continuing failure or neglect to obey" the order, and is appropriate only to the facts of divestiture, not acquisition. Under the language of the decree (App. G8), the acquisition itself, being the critical, and the only prohibited act, was completely accomplished on the day of acquisition. If the Commission had wanted to incorporate in its order a provision for immediate divestiture in such a situation, or a penalty for the continued holding of whatever had been unlawfully ac-

quired, it was free to do so, but did not. *United States* v. *Armour & Co.*, 402 U.S. 673.

The principle here espoused, of a single rather than a continuing penalty in an acquisition case has been upheld by the Court of Appeals for the Tenth Circuit in *United States* v. *ITT Continental Baking Company*, 485 F.2d 16 (1973), now pending in this Court under number 73-1290.

It is respectfully suggested that these two diametrically opposed decisions of the Eighth and Tenth Courts of Appeals could best be resolved if both cases were to be reviewed by this Honorable Court.

(2) and (3) Among the numerous depositions, exhibits, etc., filed in support of, and in opposition to, the Government's motion for summary judgment there were some which rather clearly indicated the Commission's interpretations of the meaning of the modified consent decree after its entry.

As examples:

(a) On January 25, 1968, the Commission informed National Dairy Company that its "acquisition" of certain processors or distributors in an arrangement whereby National obtained their market share would be violative of the non-acquisition provision of the National Dairy consent order (App. 1388-89). Although the terms of the National and Beatrice non-acquisition clauses were not identical, the Commission advised Beatrice, on February 19, 1968 (App. 1390), that its National interpretation also applied to Beatrice. That notification further stated:

> "On the otherhand, ordinary requirements or supply contracts under which a processor-distributor discontinues his processing business but continues to operate

as a distributor selling, under his own label, milk supplied him by respondent would not be regarded as coming within the order." (App. 1390).

National succeeded thereafter in obtaining an injunction against the Commission action of January 25, 1968, thereby invalidating the Commission's interpretation (and that of Beatrice's as well) without a formal reopening of the original proceeding "so as to make the intent, meaning and purpose of Part III (non-acquisition clause) more explicit . . ." (App. 1395). Such attempted reopening was denied by the full Commission on May 25, 1970 (App. 1397-98).

The net of all this is that National, which set up distributors, acquired market share and successfully warded off an attempt by the Commission staff to broaden the meaning of "violations" under the National consent order, has not been held to have violated its decree, while Beatrice has here been held to have committed a violation of its order despite the fact that the Commission has openly stated that, in its view, no difference exists in the substantive treatment of the parties (App. 1390).

(b) On June 21, 1967 and July 31, 1967, John P. Fox, Chief Counsel for Beatrice, conferred with staff attorneys for the Commission and the Chief of the Compliance Division (App. 908-909). During the second conversation, Fox specifically stated that the term "interest in" was far more limited in scope than the other dairy orders which characterized the prohibition in terms of "stock, share capital or assets." The staff members either agreed with the interpretation or indicated that they were not going to contest Fox's position (App. 879, 880).

The entire conversation was initiated by Fox, who, in differentiating the above terms, gave an example of

buying a truck from the Ford Motor Company which act, while clearly "acquiring" an "asset" of Ford, was actually clearly not "acquiring" an "interest in" the Ford Motor Company (App. 909).

From the above, it appears that Beatrice acted in accordance with the Commission's interpretation of the decree with respect to Maple. Yet, neither the District Court nor the Court of Appeals elected to respond in any way to these facts. And this, despite the clear language of *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, which gave such serious consideration to the Government's post-decree interpretation of a consent decree as to be controlling in the face of a later changed position on the part of the Government. The Court quoted with approval from *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378, where it was stated, "contemporaneous construction by those charged with the administration of the act . . . are . . . entitled to respectful consideration, and will not be overruled except for weighty reasons."

When it came to Count II, however, both Courts did, indeed, follow Atlantic Refining by placing great weight on the post-decree conduct of Beatrice. The even-handed justice to which litigants are entitled between one case and another was not even dispensed between one Count and the other in this case.

A similar situation arose here with regard to depositions and exhibits concerning the Commission's negotiations before the decree. Among other matters, it was suggested by the Commission that the "interest in" term was offered as being less restrictive than the previous order's "stock, share capital or assets," and amounted to a concession which prompted Beatrice to agree for the first time in the decade-long series of negotiations.

Both Courts in this case did deal with this issue, but we suggest that they did so incorrectly. They rejected consideration of these pre-decree negotiation matters, and in so doing held contrary to decisions in the First, Fourth and Ninth Circuits. *United States* v. *Star Kist Foods, Inc.*, 240 F.2d 759, 9 Cir. 1956; *Commissioner* v. *Pacific Mills, Inc.*, 207 F.2d 177, 1 Cir. 1953; and *American Brewery, Inc.* v. *United States*, 223 F.2d 43, 4 Cir., 1955; see also *Kronheim & Co.* v. *United States*, 163 F.Supp. 620, Ct. Cl. 1958.

We submit that the court erred in not considering the matters submitted by Beatrice as to both pre-decree and post-decree conduct of the Commission with respect to Count I. We also submit that this Eighth Circuit decision is in conflict with an applicable decision of this Court and with decisions of three other Courts of Appeals on a subject which is of sufficient importance to justify adjudication of the point by this Court.

The error just suggested was a grievous one, indeed, because of this having been a case of summary judgment. The matters offered, if properly considered, would at the very least have demonstrated genuine issues of material fact which, under Rule 56(c) of the Rules of Civil Procedure (Title 28), would have precluded judgment in favor of the Government without trial. Especially is this true when there is borne in mind the undisputed principle that "On summary judgment the inferences to be drawn from the underlying facts (contained in the supporting depositions, etc.) must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1961).

Regardless of the Courts' errors in excluding consideration of the pre-decree and post-decree matters, error was

committed in granting summary judgment on the balance of the record which clearly demonstrated that the proper interpretation of both words and acts were in dispute. The Court of Appeals, in reaching its opposite conclusion, relied on *United States* v. *J. B. Williams Co., Inc.*, 354 F.Supp. 521 (S.D. N.Y.). On this point that decision has very recently been reversed by the Second Circuit Court of Appeals (opinion by Judge Friendly). CCH Trade Cases 1974, ¶75,041 (not yet officially reported). In reversing a summary judgment and remanding for a jury trial the Court said:

> "On the other hand, while we agree with the court's premise that the FTC did not have the burden of showing that the accused commercials, if within the order, were false and deceptive, we are unable to see how this leads to the conclusion, 354 F. Supp. at 535, that:
>
> > Once the Commission establishes that a cease and desist order is in effect and that a particular advertisement has been disseminated which allegedly violates that order, it is for the court to determine as a matter of law whether the oral and/or visual content of the challenged advertisement falls within the scope of the prohibitions in the order.
>
> The general rule is that when the meaning or effect of words or acts is fairly disputed, the question is for the trier of the facts, to be decided after hearing all material evidence, *Washington Post Co.* v. *Chaloner*, 250 U.S. 290, 293 (1919) (libel); *Albert Dickinson Co.* v. *Mellos Peanut Co.*, 179 F. 2d 265, 269 (7 Cir. 1950) (likelihood of confusion). The district court sought to counter this by saying, 354 F. Supp. at 535 n. 11, that the issue was analogous to the interpretation of a writing in a contract action, which is considered to be an issue of law for the court, citing 4 Williston, Contracts, §616, particularly at

> 648-49 (3d ed. 1961). However, we pointed out in *Meyers* v. *Selznick Co.*, 373 F. 2d 218, 221-23 (2 Cir. 1966), after referring to this very passage in Williston, that "the traditional formulation goes considerably beyond the authorities, at least for the federal courts." In addition, the Restatement of Contracts (Second) §238(2) (Tent. Draft No. 5, March 1970), rejects the absolute position taken by Williston and states that even in the case of an integrated written agreement, interpretation is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn therefrom."

As to these questions, we therefore suggest that if this Court were to review the record here it would remand the cause for the trial to which Beatrice believes itself entitled.

(4) and (5) After almost ten years of litigation and negotiation between the Commission and Beatrice, the Commission proposed a modification of its original order which produced agreement by Beatrice and led quickly to a modified consent decree. The change in language related to the prohibition against acquisitions and substituted the words "interest in" *another dairy firm*, for the clause "stock, share capital or assets." The emphasized words in the previous sentence are of exceeding importance because they cannot properly be separated from the descriptive terms preceding them, as it is submitted was done by both lower courts in this case.

It has been related above how the Commission staff agreed with Beatrice that "interest in" another dairy was more limited than the other more usual clause which had been included in the three large dairy cases previously concluded. When the parties represented to the Court of Appeals for the Ninth Circuit (where the case was pend-

ing on appeal of Beatrice) that an agreement had finally been reached, there was every reason to believe that there had been a genuine meeting of the minds. The Court approved the consent decree and directed the Commission to modify its order accordingly, which was done.

In light of this skeletal historical background, which stands out boldly in the record of this case, it becomes absolutely incomprehensible that the Commission should have undergone such a metamorphosis between 1967 and 1970 as to produce a 180° change in its interpretation of the two concepts now in question. Yet incredibly, in the latter year a complaint was filed by the Government based, in effect, on the proposition that the modification language had really altered nothing at all in this respect, and that Beatrice had been overly gullible or not quite bright in thinking it had been granted any concession whatsoever by the change; that the Commission had obtained the consent of Beatrice to an ephemeral change by a clever maneuver which, if its current position be given face value, is now seen to have approximated some sort of ruse.

Comparison of the two decretal terms, however, indicates that they are obviously different in the dimensions of their prohibitions. Under the circumstances of the case, as well as by the language itself, an injunction against acquisition of an "interest in" another dairy is either a broader or a narrower proscription than one against acquiring "stock, share capital or assets." "Interest in" cannot be broader because "stock or other share capital" and "assets" constitute the maximum reach of Section 7 of the Clayton Act (15 U.S.C. §18) which Beatrice is charged with having violated, and the authority of the Commission stops at that point. "Interest in" another dairy must therefore be a more limited term

because it is submitted that the Commission did negotiate in all good faith when it suggested the term as a lesser injunction, and that would be the normal understanding of any reasonable person under the circumstances.

Granted that "interest in" another corporation could be equated to acquisition of all or a part of the latter's "stock" or "share capital", it cannot be stretched to cover the acquiring of some of its assets. Furthermore, there is a genuine issue of material fact in this case as to whether Beatrice even acquired any assets of Maple, particularly when it is remembered that Maple was abandoning the territory in question.

If the acts of Beatrice were held to be a violation—even from the Government's view of the facts in this case—then as soon as the deed was done the conclusion would have to be reached that Beatrice had become owner or possessor of an "interest in" Maple Island Dairies, Inc., a corporation. Certainly Maple would be the first to dispute such a proposition. It is a concept which defies legal description. If, in order to accomplish divestiture, Beatrice were to offer for sale an "interest in" Maple Island Dairies, Inc., it would seem to border on a fraud, scarcely different from offering to sell the Brooklyn Bridge.

The lower courts found that "interest", as applied to Beatrice, included the license to use the Maple label—surely not a violation, but quite the contrary. They also found that Beatrice's "interest" covered notes, factor's liens and the opportunity to sell milk to some of Maple's former independent distributors at their voluntary requisition, as these matters were "rights" previously held by Maple and had comprised *"assets"* of Maple. The opinion conceded that the security interest involved in sales contracts, and the like, gave Beatrice no title to equipment

but "a right of ownership contingent on default." In all of this, the lower courts overlooked the fact that if such ownership were to eventuate—of a truck, for example—it would have been acquired by Beatrice from the distributor and not from Maple. And, what is even more non-understandable is that if any of these things bear any relationship to Maple, it is merely as former assets, not covered by the modified consent decree, and not possibly constituting an "interest in" Maple Island Dairies, Inc., a corporation.

The opinions of both courts deal only with the word "interest," preferring not to use the full term "interest in" another dairy. The Court of Appeals (App. A6) goes so far as to state that purchase of interests *of* a dairy (which Beatrice contended was permissible) and the proscribed acquisition of interests *in* a dairy were indistinguishable, the words "in" and "of" bearing "similar connotations of active and possessive participation," citing Webster's Third International. The dictionary does not seem to read that way, and the English language is not that poverty-stricken. It is submitted that this is another misinterpretation which the court conceived to be necessary to give the decree its "normal meaning," but in so doing actually took upon itself the modification of the decree, in the manner rejected by this Court in *Hughes* v. *United States*, 342 U.S. 533.

The issue in *United States* v. *Armour & Co., et al.*, 402 U.S. 673 was not determined with reference to a definition of the word "interest." The issue there was whether or not Armour had unlawfully acquired an interest *in* a subsidiary property of Greyhound upon their merger. The Supreme Court found that Armour had not acquired an "interest in" this property merely because of its relationship with Greyhound; it also held that language surely

could have been included in the Armour order to cover that situation but that it had not. So, too, in this case. Language could have been included in the modified consent decree to prevent Beatrice from acquiring interests "of" or assets "of" Maple Island; but the language in fact used, as in the *Armour* case, prohibited only the acquisition of an "interest *in*."

The courts below adeptly avoided the thrust of the *Armour* precedent by first finding that the prohibition was violated if any "interest" was acquired (in the broadest sense) and then stating that if the parties meant to exclude acquisition of items such as sales volume while including items of physical assets, this could have been accomplished in the drafting. (344 F.Supp. 104, 113) Ironically, this is exactly what was done, but the court either failed, or was unwilling, to recognize it. Moreover, the lower court's use here of the purported *Armour* four corners limitation when coupled with its misuse of the crucial term to avoid the *Armour* holding, resulted in a total distortion of the decree.

As to the District Court's order of divestiture concerning Maple, it is difficult if not impossible to understand the nature of what it would require of Beatrice. In any event, however, it does appear that in entering the order the court was relying on the exercise of its general injunctive powers of equity. In this it committed error since no such penalty was provided for in the Commission's modified order. Further, it runs counter to the only authority on the point, *Herbold* v. *United States,* 413 F.2d 342, 9 Cir. 1969, which held that by prescribing the civil action for monetary penalty, the Congress had "indicated no intention that the equitable powers of the District Courts to issue injunctions might also be invoked."

Since *Herbold,* and quite obviously as a result of its holding, the Alaska pipeline bill was amended in Congress to add authority for the exercise of equitable power under the penalty sections of the Acts here pertinent (15 U.S.C. 21(*l*) and 45(*l*) *supra,* as amended November 16, 1973). This fact does not, however, alter the law as it existed when the issues of this case were agreed upon, then tried and appealed. *United States* v. *Stroop,* 109 F.2d 891; and *Greene* v. *United States,* 376 U.S. 149, 160.

(6) As previously noted, the original Commission order as to divestment applied to stock in certain corporations as well as physical properties. The modified consent decree, however, again more limited, merely ordered divestiture of certain "plants" and other physical properties in certain southwestern cities, but did not include stock.

Overlooking the question as to whether the modified decree covered an 18-½% stock interest owned by Beatrice in a closely-held family corporation in one such city, there still remains a question as to whether the Commission and the courts in this case acted properly with respect thereto.

The order required sale of all the "plants" to a single purchaser. The patriarch of the family-owned corporation offered to buy the minority stock and one of the dairy plants covered by the decree. That offer was turned down by the Commission (App. 59). Later Beatrice obtained an offer to purchase all the plants but not the minority stock interest. When this offer was approved by the Commission in January, 1969 Beatrice had good reason to believe that, no single purchase being any longer possible, it was relieved of the need to sell its minority stock. However, in March, 1969 it was advised to the contrary

by the Commission and therefore sought to sell the stock. But the head of the family had died, exacerbating the situation since the attorney for his estate would not recommend purchase of the Beatrice stock for more than the estate tax valuation which he was attempting to have set as low as possible.

Under these circumstances the difficult single and disadvantageous market for the stock sale, and the fact that Beatrice had not been advised by the Commission until more than nine months after the decree that it would approve a sale of less than the entire package to one purchaser, it is the position of Beatrice that it should then have been granted reasonable additional time to dispose of its minority stock. The Commission refused this request, however, and the court subjected Beatrice to a fine of $9,800 for accomplishing the stock sale a mere seven weeks beyond the original deadline.

CONCLUSION

The questions presented for review were all answered incorrectly by the lower courts:

(1) in conflict with a decision of another Court of Appeals (now pending in this Court), and with an applicable decision of this Court.

(2) and (3) in conflict with an applicable decision of this Court and with decisions of four other Courts of Appeals.

(4) and (5) in conflict with an applicable decision of this Court, and with a decision of another Court of Appeals.

(6) in flagrant abuse of discretion under the circumstances of the case.

It is earnestly requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 73-1798

In the
Supreme Court of the United States
October Term, 1973

BEATRICE FOODS CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

UNITED STATES OF AMERICA
Appellee,
vs.
BEATRICE FOODS CO.,
Appellant.

Appeal from the United States District Court for the District of Minnesota.

SUBMITTED: OCTOBER 15, 1973 FILED: MARCH 8, 1974

Before LAY and BRIGHT, *Circuit Judges*, and EISELE, *District Judge*,*

LAY, *Circuit Judge.*

This is an appeal from a summary judgment granted by the District Court for the District of Minnesota, the Honorable Philip Neville presiding, in a suit brought by the United States against Beatrice Foods Company under § 11 (*l*) of the Clayton Act, 15 U.S.C. § 21 (*l*); and § 5 (*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45 (*l*). The government sought civil penalties and injunctive relief for two violations of a Federal Trade Commission consent order. The trial court granted summary judgment in favor of the United States, assessed monetary penalties and ordered divestiture of Beatrice's holdings acquired in violation of the FTC order.[1]

On appeal Beatrice contends that:

(a) Under Count I, there has been no showing that Beatrice's transactions with Maple Island Dairies violated the consent decree;

(b) The district court erred in granting summary judgment in that questions of fact exist as to the intended meaning of the consent decree;

(c) The district court erred in imposing daily penalties for the Maple Island transactions, first, because Beatrice was not given adequate notice of the alleged

* G. THOMAS EISELE, United States District Judge, Eastern District of Arkansas, sitting by designation.

[1] The opinions below are reported at 344 F. Supp. 104 (summary judgment); and 351 F. Supp. 969 (penalties and decree).

order violation, and second, because there was no continuing violation but only a single illegal acquisition;

(d) The district court lacked the power to grant injunctive relief requiring Beatrice to divest itself of its interest in Maple Island; and

(e) Under Count II, the court erred in requiring Beatrice to divest its minority stock interest in Valley Gold Dairies.

Background

In 1956, the Federal Trade Commission instituted proceedings against Beatrice and three of its competitors alleging acquisitions in violation of § 7 of the Clayton Act, 15 U.S.C. § 18, and § 5 (a) (*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45 (a) (*l*). The proceedings against Beatrice's competitors were all settled by consent decrees.[2] In March, 1964, an FTC hearing examiner held that five of Beatrice's recent acquisitions violated § 7 of the Clayton Act. The examiner ordered divestiture of the five firms and enjoined Beatrice for ten years from acquiring "the whole or any part of the stock, share capital or assets" of any dairy firm. On April 26, 1965, the FTC affirmed the examiner's decision.

Beatrice petitioned for review of the order in the Ninth Circuit. While the petition was pending, the FTC and Beatrice agreed to settle the case with entry of a modified order. In May, 1967, the Ninth Circuit modified the FTC order to reflect the settlement and affirmed the order as modified. On June 7, 1967, the FTC issued the modified order.

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[2] Each firm was ordered to:

[C]ease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any concern, engaged * * * in the business of manufacturing, processing or selling at wholesale or on retail milk routes [specified dairy products].

The modified order required divestiture of five unlawfully acquired dairies, whether owned in whole or in part by Beatrice, to a single purchaser.[3] The order also contained the following cease and desist provision:

> Beatrice shall cease and desist, for a period of ten (10) years from the effective date of this order from acquiring, directly or indirectly, any interest in any firm, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any State of the United States or in the District of Columbia in the business of manufacturing, processing or distributing at wholesale or on retail milk routes any of the products described in Paragraph I of this order, without the prior approval of the Commission.

COUNT I: THE MAPLE ISLAND TRANSACTIONS

Count I of the government's complaint alleged that Beatrice violated the above cease and desist order by acquiring an "interest in" Maple Island Dairies. The district court so found.

Maple Island Dairies distributed dairy products in Minnesota and Wisconsin. In 1968, Maple Island decided to dispose of its unprofitable "northern division" distribution system. This division had been distributing dairy products bearing the Maple Island label (1) at four stores owned by Maple Island,[4] (2) along 11 routes operated by Maple Island employees, and (3) along 11 routes owned and operated by independent distributors.

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[3] The modified order permitted one dairy in West Virginia to be sold separately. The original order had required divestiture of fire dairy plants scattered all over the country. The consent decree, however, substituted five plants all located in the southwest.

[4] The disposition of the four Maple Island stores is not involved in this case.

Representatives from Maple Island met frequently with representatives of Russell Creamery of Wisconsin, Inc., a wholly-owned subsidiary of Beatrice. As a result of these discussions, the 11 routes owned by Maple Island were converted into independent distributorships. The new distributors purchased from Maple Island the assets used to operate the routes, including inventory and accounts receivable. The purchase of seven of the 11 routes was financed primarily by Beatrice. The new distributors agreed to distribute Maple Island products exclusively. They also executed conditional sales contracts, factor's liens, and notes in favor of Maple Island. Then, Beatrice, Maple Island, and each distributor signed an agreement whereby Maple Island assigned to Beatrice the conditional sales contract, factor's lien, note and franchise agreement, and the distributor accepted the assignment. On September 1, 1968, Russell Creamery (Beatrice) began supplying the dairy products for all but a few of the new distributors.

The 11 independent Maple Island distributors, who owned their own physical facilities, only owed Maple Island for their 30-day trade accounts. Four paid these amounts themselves, six were financed by Beatrice and one was dropped from the arrangement. Maple Island also granted to Beatrice the right to use Maple Island's labels in the northern division for five years.

As a result of the above transactions, the government charged that Beatrice had violated the consent cease and desist order by acquiring an "interest in" Maple Island.

On appeal, Beatrice argues that the phrase used in the FTC order, "interest in," "does not apply to assets or interests *of* a dairy, but rather prohibits the acquisition of an interest *in* a dairy." In rejecting this argument, and in holding that there was no dispute of facts, Judge Neville found that the term "interest" has a consistent and commonly understood meaning in relationship to property, business and other things of value, citing the Restatement of Property § 5:

> The word 'interest' is used in this Restatement both generically to include varying aggregates of rights, privileges, powers, and immunities, and distributively to mean any one of them.

The district court then found that:

> "[I]nterest" includes, by definition, the rights transferred here to Beatrice by Maple Island. The license to use the label, the notes, distributorship agreements, sales contracts and factor's liens are all "rights in the nature of property" and valuable rights forming a part of the business and in many instances comprising assets of Maple Island. Whereas before, Maple Island held all rights, privileges, powers, and immunities relating to the assets transferred, after the transfer, Beatrice held some of those rights and the independent distributors held the rest. And while the sales contracts, factor's liens and notes did not give Beatrice title, Beatrice clearly held a security *interest*, i.e., a right of ownership contingent upon the default of the titleholder. Such interests are no less interests within the terms of the order because contingent upon default of the debtor. Perhaps most significant, prior to the transfer, Maple Island had the "rights to the benefits" inseparable from the property transferred, *i.e.*, the sales of its milk to the customers along Maple Island's former routes. After the transfer, Beatrice had those rights at least for the minimum period of the distributorship agreements and the advantage of an established and continuing relationship with the distributors. Beatrice thereby gained access to all or most of the customers—the sales volume—who previously bought milk from Maple Island. The net result was an increase in gross sales of Russell Creamery in Superior alone of nearly $1 million, about 30%. *United States* v. *Beatrice Foods Co.*, 344 F. Supp. 104, 111-112 (D. Minn. 1972).

Beatrice's argument is that the trial court was totally preoccupied with defining "interest" and failed to recog-

nize that the real term of art within the decree is the preposition "in" as distinguished from the possible use of the word "of." Thus it is argued that the compromise decree allows the purchase of interests *of* a dairy and proscribes only the acquisition of interests *in* a dairy. We think the argument disingenuous. Neither preposition in the context of the overall decree demonstrates a definitive, special meaning. Both "in" and "of" are, in common usage, words of function bearing similar connotations of active and possessive participation. *See* Webster's Third New International Dictionary 1139, 1565 (1967). We must give the decree its "normal meaning" rather than one party's view of its purpose.

It is urged the trial court erred in failing to admit evidence of the pre-order negotiations between the parties to ascertain "the purpose" of the decree. Similarly, it is argued that post-decree conduct is also material.[5] We

[5] On January 25, 1968, the FTC informed National Dairy, one of Beatrice's competitors who had earlier signed a consent decree, that the acquisition of the market share of distributors or processors would violate National's order. Specifically, the FTC wrote that:

> National Dairy is hereby notified that the Commission regards the prohibition on acquisitions in said order, Part III, as including the entering into of any arrangement with another party by which National Dairy obtains the market share, in whole or in part, of such other party. Such arrangements would include any transaction by which a processor ceases selling milk under his own label and instead distributes National Dairy milk under one of National Dairy's label. On the other hand, ordinary requirements or supply contracts under which a processor-distributor discontinues his processing business but continues to operate as a distributor selling, under his own label, milk supplied him by National Dairy would not be regarded as coming within the order. (emphasis added).

The FTC advised Beatrice that it would interpret the Beatrice decree in the same manner, even though the lan-

reject this contention on the same grounds that the trial court did. In *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), the Supreme Court observed:

> [T]he scope of a consent decree must be discerned within its four corners, and *not by reference to what might satisfy the purposes of one of the parties to it.* (emphasis added).

See also Gila Valley Irrigation Dist. v. *United States*, 118 F.2d 507 (9th Cir. 1941); *United States* v. *J.B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), *appeal docketed*, No. 73-1624 (2d Cir. 1973); 80 Harv. L. Rev. 1303, 1315 (1967).

Although we think the order clear, parenthetically we note that it only prohibits acquisitions made without prior

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[5] (Continued)

guage of the two orders was slightly different. Parenthetically, we note that the Commission's interpretation of the National Dairy order was subsequently invalidated and no new clarification ensued.

Beatrice contends that the above-underlined sentence expressed the Commission's intent not to prohibit the acquisition of distributorships. It argues that this post-decree conduct by the FTC is relevant to a determination of the order's meaning. However, its authority for this point, *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959), does not appear to extend as far as Beatrice would like. There, the Court found from the language of the decree *alone* that the government's position was at best a strained construction. It then bolstered this view by reference to the government's post-decree conduct, which had been consistent with the Court's reading of the decree. Thus, it appears that the decree in *Atlantic Refining* was *unambiguous* and that the post-decree conduct was somewhat superfluous.

Furthermore, as the government notes, the FTC's letter of January 25, 1968, sets forth a far different factual hypothesis than Beatrice's arrangement whereby the rights under the distributorships carried with them the license to use Maple Island's label, its goodwill and sales volume in the northern division.

Commission approval. Beatrice knew that it was under a broad cease and desist order which was designed to prevent a large multimarket company from acquiring regional dairy firms. Beatrice could easily have allayed the risk of later litigation by seeking the Commission's prior approval before entering into negotiations with Maple Island. Significantly, Beatrice did seek FTC approval for several other acquisitions during this same period of time.

Imposition of Daily Penalties

With regard to the Maple Island transaction, the district court fined Beatrice $200 per day from September 1, 1968 (the date Beatrice began supplying milk to the independent distributors) through October 23, 1970 (the date the government filed its complaint), for a total of $156,400.

Beatrice attacks the imposition of the above penalty on two grounds. First, it argues that it was not given adequate notice of the violation until October 23, 1970, the date the complaint was filed.[6] Second, Beatrice contends that daily penalties were unwarranted because the consent order prohibits only the *act of acquisition* and not continued holding of illegally acquired assets. These two contentions will be discussed separately.

A. *Notice*

Beatrice argues that *no* penalty could be imposed before the FTC gave notice that Beatrice's conduct was in violation of the cease and desist order. Assessment of penalties for conduct occurring before such notice would, according to Beatrice, violate due process.

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[6] Since the trial court held that this was the *last* day for which a penalty could be imposed, acceptance of Beatrice's notice theory would mean that only one day's penalty could be assessed.

We look first at the statutory scheme for the imposition of penalties to determine if a notice requirement was intended by Congress.

When the FTC determines that one of its orders has been violated, the statutory procedure calls for certification of pertinent facts to the Attorney General. 15 U.S.C. § 56. If the Attorney General decides to bring suit, the penalty provisions of § 5 (*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45 (*l*), and § 11 (*l*) of the Clayton Act, 15 U.S.C. § 21 (*l*), come into play.[7] These statutes

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[7]Section 5 (*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45 (*l*), provides:

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 11 (*l*) of the Clayton Act, 15 U.S.C. § 21 (*l*), provides:

> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

contain no notice requirement. In *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), *appeal docketed*, No. 73-1624 (2d Cir. 1973), the district court unequivocally rejected the argument that notice is statutorily required:

> The court disagrees with defendants' assertion that "it is settled that the Government may not impose penalties under 15 U.S.C. § 45 (*l*) with respect to alleged violations of orders where these violations preceded Commission notice that the conduct was deemed in violation of the order." Defendants' Memorandum 58-59. *Such notice is neither required by the statutory scheme nor by the Commission's rules and procedures.* The only procedural step required by the F.T.C. Act before institution of a Section 5 (*l*) suit is the certification of facts relating to the alleged violation to the Attorney General. *See* Section 16, 15 U.S.C. § 56. A *blanket rule requiring prior notice by the Commission of alleged violations of its orders has absolutely no statutory basis whatever. Id.* at 532 (emphasis added).

The legislative history of the penalty provisions supports this conclusion. The Federal Trade Commission Act was amended in 1938 by the Wheeler-Lea Act, which provided that FTC orders would become final in 60 days or upon completion of review proceedings in the courts of appeals. Act of March 21, 1938, 52 Stat. 111. The Clayton Finality Act of 1959 similarly amended the Clayton Act. Act of July 23, 1959, 73 Stat. 243. These significant changes lend considerable support to the government's position that no notice is required by the statute. Prior to 1938, the Commission had to prove *three* violations before penalties could be assessed. First, it had to prove a violation upon which to base its own cease and desist order. Second, it had to prove a violation of the order (*i.e.*, conduct occurring *after* the issuance of the order) before a court of appeals could enforce the order. Finally, it had to prove a third violation for a violator to be held in contempt of the court of appeals enforcement order.

The Wheeler-Lea Amendment changed this cumbersome procedure. However, the same three steps remained in effect insofar as Clayton Act violations were concerned until 1959. The legislative history of the Clayton Finality Act, discussed in *FTC* v. *Jantzen, Inc.*, 386 U.S. 228 (1967), makes it clear that that amendment was designed to streamline enforcement proceedings under the Clayton Act in the same manner as the Wheeler-Lea Amendment had done for the FTC Act:

> The effectiveness of the Clayton Act . . . has long been handicapped by the absence of adequate enforcement provisions . . . . S.726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years.

S. Rep. No. 83, 86th Cong., 1st Sess. 2 (1959).

> The bill . . . is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act.

105 Cong. Rec. 12732.

In *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), the Supreme Court discussed this legislative history and then noted:

> "In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time."

Id. at 366 n.6, *quoting* H.R. Rep. No. 580, 86th Cong., 1st Sess. 4.

However, the Supreme Court did warn that overly broad language in an FTC order would not necessarily "withstand scrutiny under the 1959 amendments." The Court said:

> The severity of *possible penalties* prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

Broch, supra at 367-368.

See also Sperry Rand Corp. v. *FTC*, 288 F.2d 403, 404 (D.C. Cir. 1961); and *United States* v. *Standard Distributors, Inc.*, 267 F. Supp. 7, 9 (N.D. Ill. 1967), for a similar interpretation. *Cf. United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 388 (S.D.N.Y. 1966).

We are thus satisfied that no notice is required under the statutes. However, this does not resolve the constitutional challenge to the imposition of penalties before notice of violation is given. As indicated Beatrice asserts that notice was not given until the complaint was filed. On the other hand, the government's position is that the cease and desist order itself gives sufficient notice of what conduct is proscribed.

Beatrice relies primarily on *Continental Baking Co.* v. *Dixon*, 283 F. Supp. 235 (D. Del. 1968). There, the government notified Continental that its compliance report, with regard to a cease and desist order previously entered against it, was unacceptable in that information it contained was inadequate and incomplete. Thereafter, Continental filed a supplemental report. The FTC then notified Continental that the reports did not show compliance and added that it was unable to determine whether Continental was in violation of the order without more information.

Continental then brought suit, seeking to quash the FTC's order for a third report and requesting a pre-

liminary stay suspending penalties until the dispute over the reports was settled. Under Continental's interpretation of the statute, 15 U.S.C. § 45(*l*), it should be subjected to penalties for each day that the controversy remained unresolved (if it were ultimately found in violation)—hence, the request for the stay.

The court found that the penalty issue was not ripe for review:

> If the Court were to accept Continental's view of the relevant statutory provision it would be constrained to grant the stay requested, but as the Court reads the provisions of 15 U.S.C. § 45(*l*) in conjunction with the rules and regulations[8] of the Federal Trade Commission, the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(*l*) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process.
>
> In the instant case, the Commission concedes that it has made no decision as to whether plaintiff's conduct violates the cease and desist order. As this Court views the litigation at this preliminary stage, no penalties have accrued against which this Court could issue a stay, and thus, there is no justiciable controversy which would render the case ripe and proper for review.

Continental Baking Co. v. *Dixon*, 283 F. Supp. 285, 287-288 (D. Del. 1968).

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[8] As the government points out in its brief, the court never indicated what rules and regulations of the Commission it was referring to. There are no Commission regulations which require the giving of notice of a violation.

Beatrice likewise relies on the dictum of the district court found in *United States* v. *ITT Continental Baking Co.*, No. C-1220 (D. Colo. Aug. 2, 1971), *aff'd*, No. 72-1072-73 (10th Cir. Sept. 24, 1973). That case was also a suit by the government to recover civil penalties and injunctive relief for violations of a consent cease and desist order. Although the district court found that the transactions violated the order, it refused to impose daily penalties based on the "single acquisition" theory (discussed *infra*). With respect to notice, ITT Continental apparently contended that the FTC had to notify it of its intent to certify the case to the Attorney General. The district court rejected this argument; however, it added the following statement:

> Had the Court concluded that the violations were continuing in nature, a determination of the question of whether or not reasonable notice should have been given would be required. In light of the Court's finding in paragraph 7 hereof, this question need not be resolved, but, as obiter dictum, it would seem unreasonable to permit the commission to *knowingly* let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time.

Slip Opinion at 5 (emphasis added).

In affirming the district court, the Tenth Circuit made no mention of the notice issue, presumably because it was unnecessary in light of the court's holding that daily penalties were unwarranted.[9]

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[9] The only other case to consider the notice issue in the constitutional sense appears to be *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), *appeal docketed*, No. 73-1624 (2d Cir. 1973). Although the court *rejected* the constitutional argument, it appears that the case is distinguishable on its facts:

> If defendants intend by this assertion to claim a violation of their right to due process in this case, the claim is rejected. *The record shows that the FTC*

Beatrice attempts to bolster its due process argument with the following facts:

(1) On December 9, 1968, the Commission notified Beatrice by letter that it had come to the Commission's attention that Beatrice "may have acquired, directly or indirectly, an interest in Maple Island . . . ." This letter also requested Beatrice to submit all information relevant to the Maple Island transaction and "a detailed statement why, in Beatrice's opinion, the acquisitions or transactions are not subject to the Commission's order."

(2) In January, 1969, Beatrice filed its annual compliance report, in which it referred only to "agreements with independent distributors of Maple Island." This information being inadequate, the Commission, by letter dated April 29, 1969, again requested Beatrice to provide detailed information regarding the Maple Island arrangements." It does not appear in the record that Beatrice ever replied directly to this letter.

(3) On September 12, 1969, the Commission resolved to investigate Beatrice's compliance with the order. By letter of September 12, 1969, the Commission informed Beatrice of the resolution. The letter also rejected Beatrice's 1969 compliance report "for the reason that the Commission is unable to determine from such report the manner and extent of Beatrice's compliance with [the

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[9] (Continued)

informed defendants that the advertisements contained in their first compliance report were in violation of the order. The Commission took the unusual step of permitting defendants to file a second compliance report. The Commission informed defendants in June, 1969, on the basis of this report, that they were still not in compliance with the order. When, after this notice and after 17 months since the order became final, defendants proceeded to disseminate the advertisements challenged here without prior approval by the Commission, defendants acted at their own peril.

J. B. Williams, supra at 532-533 (emphasis added).

cease and desist] order." The letter further stated that the Commission was of the opinion that the report "raises a real question as to whether the arrangements did not in fact involve fundamental questions of order coverage." Pursuant to the September 12, 1969, resolution, the Commission also ordered Beatrice and Maple Island to file special reports. These reports were filed with the Commission in November, 1969.

(4) On June 17, 1970, the Commission certified to the Attorney General the facts it felt constituted violations of the order. It does not appear from the record that Beatrice was notified of this certification. On the Commission's recommendation, the Attorney General filed suit on October 23, 1970.

In summary, none of the Commission's communications with Beatrice prior to October 23, 1970, unequivocally stated that the Commission felt Beatrice was in violation of the order.[10] At most, the Commission indicated that *possible* violations existed which warranted further investigation. Beatrice urges that this is exactly what *Continental Baking Co.* v. *Dixon, supra,* held to be insufficient notice.

The government does not attempt to distinguish *Dixon,* but simply asserts that the decision ignores the statutory scheme.[11] Relying on the previously discussed legislative history, the government argues that the order itself is sufficient notice of the duty it imposes.

We think the basic question necessarily turns on whether the order itself is sufficiently clear to place Beatrice on notice of the prohibited conduct. The question of proper

[10] As will be discussed, the government specifically informed Beatrice of the Valley Gold (Count II) violation.

[11] The government points to *United States* v. *Ancorp National Services, Inc.,* No. 70 Civ. 5770 (S.D.N.Y. July 30, 1971), where, in a ruling on a preliminary motion, the court characterized *Dixon* as "a misconception of the entire statutory framework."

notice, as in cases of statutory construction, depends on whether the order itself is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Cf. Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). This same reasoning must apply to construction of the order here involved. Our examination satisfies us that the FTC decree barring Beatrice from acquiring any "interest in" a dairy firm was in fact sufficiently precise in terminology to place Beatrice on notice of its wrongful action in its transactions with Maple Island Dairies. Additionally, one cannot completely ignore the atmosphere and official history surrounding the cease and desist order. We think it obvious, as the trial court concluded, that "the acquisition of the sales volume by Beatrice and the loss of Maple Island as a competitior is the kind of event the order was intended to prevent." Moreover, the delay and alleged uncertainty of the FTC in stating that the transactions were proscribed is attributable in large measure to Beatrice's own procrastination in giving the FTC sufficient information upon which to act. If Beatrice had simply taken the trouble to seek permission of the FTC or even to make inquiries whether FTC approval was necessary, much delay could have been avoided.

Litigation continually arises as to the meaning and breadth to be given consent decrees in antitrust cases. *Cf. United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). Simply because a party misconstrues its lawful obligations under such decrees, it is not accorded a legal defense if in law that interpretation turns out to be erroneous. Misunderstanding of the law is no more an excuse under the Clayton Act than anywhere else. In effect, the argument proffered here is similar to the defendant's contention, urged more emphatically in the district court under Count II, that it acted in good faith. We think, as did the district court, that if this has any relevancy at all it is a factor to be considered by the trial court only in measuring or mitigating the penalty.

B. *The Offense: Single or Continuing?*

The continuing penalty provisions of 15 U.S.C. §§ 21(*l*) and 45 (*l*) are virtually identical. Section 21(*l*) provides:

> Each separate violation of any such order shall be a separate offense, *except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.* (emphasis added).

Beatrice argues that here was no *continuing* violation. Since the consent decree prohibits only "acquisitions"[12] rather than "acquisitions and further holdings," Beatrice argues that it has committed only one violation because an acquisition is an isolated occurrence which is not continuing in nature.[13] The government, on the other hand, argues that an acquisition is a continuing offense until it is undone.

This case is factually similar to *United States* v. *ITT Continental Baking Co.*, No. C-1220 (D. Colo. Aug. 2, 1971), *aff'd*, No. 72-1072-73 (10th Cir. Sept. 24, 1973), wherein the Tenth Circuit adopted the position advocated by Beatrice, *i.e.*, that the FTC order[14] merely proscribed the *acquisition* itself, and not the *method* of operation thereafter, is the critical factor, and this is the event to which the complaint and the order were directed." Slip Opinion at 5 (emphasis in original).

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[12] The relevant portion of the decree is set out in full at p. 4 of this opinion.

[13] Beatrice concedes that an order could be drawn which would prohibit acquisitions *and further holdings;* however, it argues that the order in question was not so drawn. Beatrice does not cite to any nonacquisition orders drawn with what it considers the requisite specificity. The clause in the Beatrice order seems to be the standard nonacquisition language.

[14] The relevant language in the ITT order is identical to that in the Beatrice decree.

Such a limited construction of the order ignores the crucial effects of an acquisition and would render non-acquisition orders virtually meaningless.[15] As the government persuasively urges here:

> For competitive purposes there is nothing intrinsically wrong with the "act of acquisition" in and of itself. *Rather it is the effect of an acquisition, the relationship it creates which may lead to its proscription . . .* The order's express and agreed terms barred further "acquisitions" and that term plainly had the same meaning as in Section 7 of the Clayton Act. The anticompetitive effects of acquisitions condemned by Section 7 come from the fact that, by holding the assets, acquiring firm changes the competitive structure of the industry involved. It is the permanent effect of prohibited acquisitions which Congress sought to remedy in the statute . . . [Any other interpretation] *would convert all orders barring future*

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[15]The Tenth Circuit stated that the imposition of [single] penalties "does not insulate the *consequences* of the acquisition from further proceedings which remain available to the Government." Slip Opinion at 12 (emphasis added). Although it did not give any indication as to what these further proceedings are, there appear to be only two conceivable alternatives. First, the government could bring a contempt action for violation of the order, in which case the penalties would be within the discretion of the court. However, since the contempt suit and the civil penalty suit are regarded as concurrent remedies (*see United States* v. *Standard Distributors, Inc.*, 267 F. Supp. 7, 10-11 [N.D. Ill. 1967]) equally available to the government, there is no reason to limit the government to the contempt action when it is seeking more than $5,000 in penalties. Second, the government could bring a separate action for divestiture (or, as it did here, seek divestiture as another remedy for the order violation). However, divestiture alone is clearly not an adequate alternative. In the present case, Beatrice has enjoyed the benefits of the illegal acquisition since September 1, 1968, and continues to do so to this date since the district court's order was stayed pending appeal.

> *acquisitions into minor expenses of any acquisition or merger, for the prohibition could be avoided by payment of a $5,000 penalty.* (emphasis added).

In *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971), the court reasoned:

> Here the very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. *We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no "presumption of continuance of unlawful conduct." Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture.*

Id. at 965 (emphasis added).

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the defendants argued that where the challenged stock acquisition occurred in 1917, the government could not bring suit in 1949 to undo the acquisition since § 7 was applicable only to the acquisition and not to the subsequent holding of the stock. The Supreme Court rejected this argument:

> We repeat, that the test of a violation of § 7 is whether, at the time of the suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. . . . *The fire that was kindled in 1917 continues to smolder.*

Id. at 607 (emphasis added).[16]

In *United States* v. *Schine*, 260 F.2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934 (1959), the defendants were

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[16] *Gottesman* and *du Pont* each involved § 7 of the Clayton Act. Since the cease and desist order in our case is based upon the 1956 findings of the FTC that Beatrice had violated § 7, interpretations of that statute should be equally pertinent to an interpretation of the consent order.

found to have violated an antitrust decree by acquiring interests in theaters without prior court approval. The defendants tried to argue that the statute of limitations on these acquisitions had run; however, the court held:

> [A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the "illegal" conditions which they created continued up to the date of the order to show cause and resulted in what might be called "continuing contempts."

Id. at 555-556.

It is significant that Beatrice does not contest the imposition of daily penalties for the Count II (Valley Gold) failure to divest. As the government points out, the daily penalty provision was thought necessary in the case of divestiture orders because otherwise "an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H.R. Rep. No. 580, 86th Cong., 1st Sess. 7. If each day's holding of assets subject to a divestiture order is a separate offense, we think the same should be true of each day's holding of illegally acquired interests.

Equitable Power of District Court to Order Divestiture

The district court's order of December 26, 1972, required Beatrice to divest itself:

> absolutely and outright in good faith of all rights, titles, interests, assets and facilities including the use thereof, directly or indirectly acquired by defendant or its agents and subsidiaries in the former so-called northern division or area of Maple Island Dairy as the result of, and arising out of, its arrangements, contracts, or agreements or those of defendant's agents and subsidiaries, with Maple Island Dairy or others.

United States v. *Beatrice Foods Co.*, 351 F. Supp. 969, 972 (D. Minn. 1972).

Beatrice complains that the district court lacked authority to enter the above order. Beatrice relies primarily

on *Herbold Laboratory, Inc.* v. *United States*, 413 F.2d 342 (9th Cir. 1969). In *Herbold*, the Ninth Circuit reasoned that "Congress, in prescribing a civil action for monetary penalties [15 U.S.C. § 45(*l*)], indicated no intent that the equitable powers of District Courts to issue injunctions might also be invoked." *Id.* at 344. The court further observed that:

> When a statute so clearly provides certain, specific sanctions for violations of a Cease and Desist Order, we cannot believe that the courts should reach beyond the statutory provisions and exert a power which, apparently, the Congress has deliberately withheld. *id.*[17]

Here, the district court held that 15 U.S.C. § 45(*l*), "though making no mention thereof, does not attempt to limit the exercise of the court's general equitable powers . . . ." *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969, 971 (D. Minn. 1972) We find ample authority for this reasoning.

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[17] It is significant to note that the *Herbold* court reversed the district court *in toto* because it found that Herbold had not violated the cease and desist order. Moreover, the government had not requested injunctive relief until the time of closing argument before the trial court. The Ninth Circuit discussed the injunctive power question only because it was not sure that "the District Court, had it reached the conclusion that the appellants had not violated the Order, would not have undertaken to enjoin future violations." *Herbold*, *supra* at 344. Thus, the reasoning of the Ninth Circuit with respect to the propriety of injunctive relief was clearly dicta. The rationale of *Herbold* has been rejected by other courts. *See United States* v. *ITT Continental Baking Co.*, No. C-1220 (D. Colo. Aug. 2. 1971), *aff'd*, No. 72-1072-73 (10th Cir. Sept. 24, 1973); *United States* v. *Bostic*, 336 F. Supp. 1312 (D.S.C. 1971), *aff'd per curiam*, 473 F.2d 1388 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *United States* v. *Vitasafe Corp.*, 234 F. Supp. 710 (S.D.N.Y. 1964), *aff'd per curiam*, 352 F.2d 62 (2d Cir. 1965).

In *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Price Administrator brought suit to enjoin a landlord from violating the Emergency Price Control Act and to require him to make restitution to tenants of excess rents collected. The trial court granted the injunction, but denied the restitution order because it felt there was no jurisdiction under the statute for restitution.

The Supreme Court reversed, finding that the district court's inherent equitable powers could be used to sustain a restitution order:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.* "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503. See also *Hecht Co.* v. *Bowles*, *supra*, 330.

Porter, *supra* at 398 (emphasis added).

See also Wyandotte Transportation Co. v. *United States*, 389 U.S. 191, 200 (1967); *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970).[18]

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[18] As stated in *Walling* v. *Brooklyn Braid Co., Inc.*, 152 F.2d 938 (2d Cir. 1945):

> The action taken below was based upon the general powers of courts of equity to grant injunctions and, as in cases between private litigants, the public interest is always to be considered and protected when such a court in the exercise of its sound discretion grants or withholds injunctive relief. Central Kentucky Gas Co. v. Railroad Commission, 290 U.S. 264, 271, 54 S.Ct. 154, 78 L.Ed. 307; United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211. In a case like this it is self-evident that the public

Finally, we note that the underlying statutory basis for an FTC cease and desist order is § 7 of the Clayton Act. Apropos to our discussion is the Supreme Court's discussion of that section in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328-331 (1961):

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate §7. That statute is specific and "narrowly directed," . . . . The very words of §7 suggest that undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy §7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated §7 cases which have been reported, most decreed divestiture as a matter of course. *Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's*

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[18] (Continued)

> interest is directly concerned in the proper enforcement of a valid wage order. Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations either when they are about to occur or prevent their continuance after they have begun. *The trial court is not bound by the strict requirements of traditional equity as developed in private litigation but in deciding whether or not to grant an injunction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted.*

Id. at 940-941 (emphasis added).

mind when a violation of §7 has been found. (emphasis added).[19]

COUNT II: THE VALLEY GOLD TRANSACTION

As part of the consent decree, Beatrice was ordered to divest itself of its ownership of certain plants. The relevant portion of the decree reads:

> Beatrice Foods Co., ("Beatrice"), within a period not exceeding eighteen (18) months from the effective date of this order, unless extended, shall divest itself absolutely and in good faith to a purchaser approved in advance by the Commission, of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at Pasadena, California (two plants); Cedar City, Utah; El Paso, Texas; Roswell, New Mexico; Albuquerque, New Mexico; all locations in the State of Arizona; and Morgantown, West Virginia, . . . as may be necessary to restore the properties as competitive entities, all as hereinafter provided.
>
> Provided, however, that this order does not require that the plant, assets, properties and businesses located at Morgantown, West Virginia, be sold to the purchaser of the other plants, assets, properties and businesses described above.
>
> Provided further, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.

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[19] On November 16, 1973, § 5(*l*) of the Federal Trade Commission Act was amended, expressly empowering district courts "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate . . . ." Pub. L. No. 93-153, § 408(c). In a letter to this court, the government has urged alternatively the retroactive applicability of this amendment because of its "remedial" nature. In view of our holding, we need not pass on this question.

As used in this order the term "assets, properties and businesses conducted by Beatrice at or in conjunction with said plants" shall include all dairy distribution stations and branches regardless of where located, which are owned in whole or in part by Beatrice or operated by Beatrice and supplied by any of said plants.

In the fall of 1967, Beatrice presented for FTC approval an offer to purchase the El Paso dairy and the 18½% stock interest in Valley Gold Dairies, Albuquerque. This offer was rejected by the FTC, presumably because it did not dispose of *all* of the properties in the order to a single purchaser.

In January, 1969, Beatrice presented for FTC approval a plan to sell the four wholly-owned Beatrice properties in El Paso, Texas; Glendale, Arizona; Cedar City, Utah; and Pasadena, California, to a single purchaser. No one but the Valley Gold majority stockholder was interested in purchasing Beatrice's Valley Gold stock. However, this stockholder was *not* interested in all four of the other properties. Thus, it was impossible to sell all five to a single purchaser. Accordingly, the FTC approved the sale of the other four properties to a single purchaser, knowing that the Valley Gold stock was not part of the package. Thereafter the following events ensued:

(1) On March 6, 1969 (after the expiration of the 18-month period of the order), the FTC asked Beatrice to inform the FTC of its efforts regarding compliance with the divestiture order vis-a-vis the Valley Gold stock.

(2) Beatrice initially attempted to have the Valley Gold stock deleted from the order. The FTC denied this petition. In August, 1969, Beatrice therefore requested an extension of time until August 31, 1970, in which to divest the Valley Gold stock.

(3) The FTC denied the extension request, but said no action would be taken against Beatrice if the sale were completed by November 15, 1969.

(4) On November 14, 1969, Beatrice requested an extension until February 15, 1970. The FTC denied this request on December 12, 1969, and informed Beatrice that it intended to institute enforcement proceedings.

(5) On December 30, 1969, Beatrice requested FTC approval to sell the stock to the estate of the majority stockholder. Approval was given and the sale was actually completed on January 2, 1970.

The district court entered summary judgment for the government on this count as well, assessing penalties from November 15, 1969.

Beatrice argues that the order required timely divestiture of "all *plants* which are owned in whole or in part by Beatrice or operated by Beatrice at . . . Albuquerque, New Mexico." (emphasis added). Beatrice contends that it never owned, in whole or in part, a "plant" in Albuquerque and urges that the trial court erred in equating a minority stock interest with ownership of a plant.

In its answer to the complaint, Beatrice "admits that it was required to divest itself of its interest in . . . Valley Gold Dairies."[20] Thus, there existed no material question of fact with respect to the meaning of the order. The trial court was correct in rejecting this argument.

Beatrice's second contention is that the FTC's approval of the sale of the four properties to a single purchaser constituted a waiver of that portion of the order requiring divestiture of the Valley Gold stock. There is no merit to this argument. Beatrice completely ignores the proviso to the order which reads as follows:

> Provided further, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts it has been unable to dispose of the plants, assets,

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[20] The trial court also examined internal Beatrice memoranda which it found unequivocally recognized Beatrice's obligation to divest the Valley Gold stock.

> properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.

This paragraph simply means that the FTC's approval of the sale of the four properties only relieved Beatrice of the obligation to sell all five to a single purchaser. Beatrice was still required to find a second purchaser for the Valley Gold stock.

It is totally irrelevant that in 1967 the FTC rejected a proposed sale of the El Paso plant and the Valley Gold stock to a single purchaser. The FTC was merely trying to effectuate the purpose of the order, which would have been thwarted by approval of such a sale. The rejection simply meant that Beatrice had to come up with a better package, not that it was excused from further performance.

Beatrice next contends that it was entitled to an additional eighteen months in which to divest the Valley Gold stock from March 6, 1969, the date when, according to Beatrice, it first received notice that it was still obligated to divest the Valley Gold stock. We disagree. Beatrice had notice from the date of the order that it had eighteen months in which to divest all five properties. As discussed earlier, the FTC's approval of the sale of the four properties did not terminate Beatrice's obligation to sell the Valley Gold stock. The divestiture order is clearly divided into two parts: (1) a one-year period in which Beatrice was to attempt to sell all five properties to a single purchaser, and (2) an additional six months in which Beatrice could complete the divestitures by sales to separate purchasers, if need be. Thus, the old order did not become "inoperative" when the first sale was approved; rather, it simply progressed to the second stage.

Finally, Beatrice raises a good faith defense to the Valley Gold Count. It argues that it was placed in an impossible position because there was only one purchaser

interested in the Valley Gold stock, and this purchaser was not interested in the other properties. And, after the approved sale of the other properties, Beatrice still had difficulty completing the Valley Gold sale because of the purchaser's refusal to pay what Beatrice considered a fair price. The trial court properly rejected the good faith argument as a complete defense.[21]

The discretionary nature of the penalties here involved is crucial. Thus, in *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383 (S.D.N.Y. 1966), the court held that good faith is not a defense to an action for civil penalties under § 45(*l*). *Accord, United States* v. *Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962). In *H. M. Prince*, the court observed that the order's "main objective is to insure the protection of the public which must be protected whether the violations are intentional or not." *H. M. Prince, supra* at 388. Thus, we conclude, as did the district court, that good faith is only relevant to the severity of the penalty to be assessed.

The trial court's judgment on both counts is affirmed.

A true copy.

Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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[21] The court did, however, consider defendant's claimed good faith when it assessed penalties at the rate of $200 per day, rather than the $5,000 per day requested by the government. Judge Neville observed:

> The court has some sympathy as a business proposition with defendant's difficulty in finding a ready market for a minority stock interest in a closed corporation, particularly where the principal stockholder of the corporation became deceased. The court also recognizes defendant did divest itself of its other properties as required and eventually of the Valley Gold stock, though some 49 days too late and beyond the last extension of time.

United States v. *Beatrice Foods Co.*, 351 F. Supp. 969, 971 (D. Minn. 1972).

APPENDIX B

UNITED STATES of America,
Plaintiff,

v.

BEATRICE FOODS CO., Defendant.

No. 4-70 Civ. 459.
United States District Court,
D. Minnesota,
Fourth Division.

June 16, 1972

Robert G. Renner, U. S. Atty., by Neal J. Shapiro, Asst. U. S. Atty., Minneapolis, Minn., together with H. Robert Field, and James E. Corkey, Dept. of Justice, Washington, D. C., appeared for plaintiff.

Winston, Strawn, Smith & Patterson, by Ronald Butler, Chicago, Ill., appeared for defendant.

NEVILLE, District Judge.

The government has brought this civil enforcement action at the instance of the Federal Trade Commission (FTC), seeking monetary penalties and other relief from the defendant Beatrice Foods Co. (Beatrice) for alleged violations of a Federal Trade Commission order which was the product of negotiations between the parties during the pendency of an appeal by defendant from an earlier adverse FTC order. The government moved for summary judgment on the issue of as to whether violations occurred, with the thought that if the motion be granted, the parties and the court should contemplate further proceedings relative to penalties to be imposed or other relief to be granted. Penalties for violation of FTC orders are provided in the Federal Trade Commission Act, 15 U.S.C. § 45(*l*); and in the Clayton Act, 15 U.S.C. § 21(*l*). Juris-

diction is found under 28 U.S.C. §§ 1337 and 1345; venue under 28 U.S.C. § 22. For the reasons stated below, the motion of the government should be granted on both counts of the complaint.

The case arises from a protracted proceeding before the FTC, In the Matter of Beatrice Foods Co., FTC Docket 6653. A complaint filed in 1956 there charged that Beatrice, a distributor and processor of milk and allied products among other things, had violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by acquiring numerous companies engaged in various facets of the dairy industry. The hearing examiner filed an initial decision and order on March 2, 1964, wherein he found that five of the acquisitions complained of constituted violations of the Clayton Act. He recommended divestiture of four of those companies and a ten-year prohibition on future similar acquisitions.

Beatrice appealed the examiner's order. The FTC confirmed his findings on April 26, 1965 and entered a substantially similar final order on December 10, 1965.[1] Beatrice then sought review in the United States Court of Appeals for the Ninth Circuit. While the appeal was pending, negotiations between the parties resulted in a joint motion to the Circuit Court recommending entry of an agreed order by that court. The appeals court granted the motion on May 23, 1967, some 11 years after initiation of the original proceeding and on June 7, 1967, the FTC issued a modified order identical with that of that court.[2]

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[1] The complaint, initial decision and Commission opinion are reported in 67 FTC Decisions 473-734. The December order and accompanying opinion are reported in 68 FTC Decisions 1003-08.

[2] There is controversy as to the date the last FTC order became final. For purposes of this motion the government accepts defendant's date of June 7, 1967.

Two sections of the final order are the focus of the instant case, parts I and III which read in pertinent part as follows:

> [Part I]
>
> Beatrice Foods Co., ('Beatrice') within a period not exceeding (18) months from the effective date of this order, unless extended, shall *divest itself absolutely and in good faith* to a purchaser approved in advance by the Commission of all plants which are *owned in whole or in part by Beatrice* or operated by Beatrice *at . . . . Albuquerque, New Mexico; . . .* and which are engaged in the manufacturing, processing or distribution of pasteurized and homogenized milks, buttermilk, skim milk, cream, half and half, sour creams, cottage cheese, ice cream, ice milk, mellorine-type products, sherbet, or water ices. . . .
>
> [Part III]
>
> *Beatrice shall cease and desist,* for a period of ten (10) years from the effective date of this order *from acquiring, directly or indirectly, any interest in any firm,* corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States or in the District of Columbia in the business of manufacturing, processing *or distributing at wholesale or at retail milk* or any of the products described in Paragraph I of this order, without the prior approval of the Commission. [Emphasis added]

Count I of the complaint here charges that during the 10 year operative period of the order, Beatrice entered into a group of transactions involving a certain Maple Island Dairies, Inc. of Minnesota, which resulted in an acquisition or acquisitions violative of Part III of that order.

By Count II the government charges that Beatrice's failure to divest itself of its corporate stock interest in the Valley Gold Dairy of Albuquerque, N.M. within 18 months from the date the order became final was a violation of

the order. Although the Valley Gold Stock eventually was sold, the government claims the divestiture was not timely.

Resisting the government's motion, Beatrice claims essentially that, as to Count I, there are numerous disputed issues of material fact both as to the *nature* of the transactions involved—whether or not anything prohibited was *"acquired"*—and as to the meaning of the term *"interest"* in the consent order (quoted above). As to Count II, Beatrice claims there were *de facto* extensions granted by the FTC and good faith substantial compliance with the divestiture order, and that in any event whether or not there was substantial compliance is an issue of fact requiring a jury decision. In summary, thus, the issues are:

> As to Count I, did Beatrice "acquire" an "interest" as a result of its transactions with Maple Island Dairies, Inc.?
>
> As to Count II, was any extension of time for compliance granted and was there "substantial compliance" as a defense to failure to divest within the time presented by the order or any extension thereof?

[1, 2] On a summary judgment motion, where there are disputes as to material fact, the question must be viewed in the light most favorable to the party opposing the motion. As defendant points out there is authority which holds that summary judgment is inappropriate in certain complex antitrust cases where motive and intent are important and credibility is a factor.[3] However, the more apposite line of authority is that which holds that where the gist of the case turns on documentary evidence and involves conclusions of law, summary judgment is

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[3] Norfolk Monument Co. v. Woodlawn Memorial Gardens, 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969); Poller v. CBS, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

proper.[4] Here the evidence is substantial in volume and the transactions were intricate, but there is no dispute over the factual events which are represented by documents produced from or by Beatrice itself, only over their characterization within the meaning of this FTC order. The issue it seems to the court is not, for example, did Beatrice *intend* to acquire an interest in another company, but rather was an interest acquired.

COUNT I

The undisputed facts of the transactions underlying Count I are as follows:

In the Spring of 1968 Maple Island Dairies, Inc., a milk distributor, concluded to dispose of an unprofitable segment of its business which it called the northern division. That division consisted of four company-owned and operated dairy stores, 11 company owned branch distributors with established routes and 11 independent distributors also with established routes. Maple Island had had prior business dealings with two wholly owned Beatrice subsidiaries, competitors of Maple Island, Russell Creamery Company of Superior, Wisconsin and Russell Creamery Co. of Brainerd, Minnesota, both milk processors and distributors. In a series of meetings to discuss the disposition of Maple Island's northern division, the president of Maple Island, met with the president of Russell Creamery of Superior. A set of transactions resulted, after oral approval in principle by Russells' Beatrice superiors on July 11, 1968, whereby Russell would supply all but a few of the former Maple Island routes. The changeover began September 1, 1968, and a set of transactions was working out for each distribution point.

The company owned routes were converted into independent distributorships. In all but two cases, the new

[4] White Motor v. United States, 372 U.S. 253, 84 S.Ct. 696, 9 L.Ed.2d 738 (1962). *See generally* text and cases cited in Moore's Federal Prac. § 56.16, especially pages 2452-53.

distributors were the former operating employees of Maple Island or an existing independent Russell distributor. In each such case, a meeting was held where the new distributor purchased the assets at the location, including any inventory and accounts receivable. The purchaser made a modest down payment with the remainder being financed by Beatrice.[5] Present at each meeting were the purchaser and representatives of Maple Island and Beatrice. The exhibits attached to the government brief produced from Beatrice show that, typically, at each meeting the former Maple Island employee or existing Russell distributor first executed an "Agreement to purchase", distributorship contract, factor's lien, conditional sales contract and note bearing 7% interest. Contemporaneously, a Beatrice subsidiary executed a check for the balance due after the down payment.[6] Also at each meeting Maple Island assigned at its rights under the distributorship contracts to Beatrice. The assignment was accomplished in each case by a document, signed by Maple Island, Russell and the new distributor, which contained the following recital:

> "For value received, I hereby assign the attached conditional Sales Contract, Factor's Lien, Note, Franchise Agreement of ..... to Russell Creamery Co. . . . ."

As to the 11 independent Maple Island distributors in the northern division, the only assets transferred were 30

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[5] Of the 11 branch offices, the transfer of seven was financed by Beatrice. Two were financed from other sources, one by Maple Island and the eleventh was not transferred. Of the four stores, two were portable and removed, one at Virginia, Minnesota was transferred with the branch office, and the fourth, Grand Rapids, was finally transferred to an existing Russell distributor.

[6] All but one of these checks were made payable to Maple Island. One was endorsed to Maple Island by the new distributor.

day trade accounts owed by them to Maple Island. In six cases, the Beatrice subsidiary issued a check to the distributor who in turn, by prior agreement with Beatrice, endorsed it to Maple Island in payment of outstanding accounts. Four distributors financed their own transfers. One in Amery, Wisconsin, was dropped from the arrangement by mutual agreement.

Also included in the arrangements between Maple Island and Beatrice was a five-year license for use of the Maple Island label. During the period when the transfers were being made, an exchange of correspondence between Russell and Maple Island resulted in a letter (Government Exhibit No. 14, Beatrice Special Report Exhibit II-X-5) which gave that license and is otherwise instructive.

"September 23, 1968

Mr. R. E. Russell
Russell Creamery Co. of Wisconsin, Inc.
1625 Broadway
Superior, Wisconsin 54881

Re: Fluid Milk and Ice Cream Distribution
Under Maple Island Label

Dear Mr. Russell:

This will confirm our agreement with you concerning the processing and sale of fluid milk and ice cream products under the Maple Island label to certain independent distributors, company owned branches and dairy stores located in the area north of the Twin Cities, which locations are described on the attached sheet.

Effective September 1, 1968, or as soon thereafter as possible, you are to commence serving these locations direct from your plants at Superior, Wisconsin, and Brainerd, Minnesota, with such sales to be made on an open account basis in accordance with your normal selling terms, as we have previously discussed this matter.

As we informed you, we have decided to discontinue serving these locations, since their location in the area

north of the Twin Cities has been uprofitable due to the long hauling distances and the fact that they are mostly in small towns where the growth potential is not large. For this reason, we have also decided to dispose of these company branches and dairy stores to independent distributors and as these disposals are accomplished, we will expect you to continue to serve such accounts and bill them direct, however, in the meantime we will continue to operate these locations.

Since a substantial portion of *this volume is packaged under our Maple Island private label for which a consumer demand has been established,* we hereby agree to authorize you to use such label on the packages now being processed and distributed at these locations for a period of five years from September 1, 1968.

You agree to hold Maple Island, Inc. and its subsidiary companies harmless from any all claims and losses including costs of defense arising out of the use of our name from and after September 1, 1968. *You also agree that you will do nothing to injure the goodwill of the name or jeopardize its value.*

If this meets with your approval, please sign the extra copy of this letter enclosed and return it to me.

Very truly yours,
Maple Island Dairies, Inc.
By: /s/ D. W. O'Brien
D. W. O'Brien, Vice President"
[Emphasis added]

That letter together with other correspondence and documents clearly shows that the transactions were a "package deal". In addition, various documents from Russell and Maple Island files refer to their "courtship" and to the "disposal" or "sale" of the northern division. As previously noted prior to the transactions Maple Island was a competitor of Russell in many of the towns and cities in the northern division area. Afterwards, only Russell supplied milk to those locations.

While there is no direct indication of the "value received" by Maple Island for its assignments, certain letters and account sheet in the record reveal that after September 1, 1968, Maple Island was charging—and Russell was paying—interest on the unpaid balance of the book value of *the physical assets plus a $20,000 upward adjustment. Also,* between September 1, 1968 and December 13, 1968, checks totalling about $230,000 were negotiated from Beatrice subsidiaries to Maple Island, either directly or by immediate endorsement from the distributor to Maple Island.[7] At minimum, therefore, with Beatrice providing financing in most cases, Maple Island was able to recover its investments or a substantial portion thereof in the northern division, including its accounts receivable, immediately rather than having to finance the transactions itself or to depend upon the ability of the purchasers to find independent sources of credit. Primarily as a direct result of the arrangement with Maple Island, the annual sales of Russell Creamery of Superior alone increased by some 30%, or by nearly $1 million.

The government asserts that by virtue of the series of transactions described above, Beatrice through its subsidiaries Russell, acquired the sales volume or market share, good will and the beneficial use of the label and other assets of Maple Island, its former competitor in northern Minnesota. The government contends that what was acquired is an "interest" within the meaning of the FTC consent order. Beatrice disputes these assertions, arguing the following issues of material fact:

(1) Whether the word "interest" as used in the negotiated decree is not in fact an ambiguous term and therefore oral negotiations between FTC personnel

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[7] See Appendix I, Gov't Brief. Checks in the amount of about $175,000 were made out directly to Maple Island by Russell to finance the purchase of Maple Island owned routes. (The purchasers of the routes made down payments totalling $27,000.) Indirect payments by immediate endorsement totalled some $55,000.

and Beatrice attorneys and personnel prior to the decree and post decree conduct in relation to other cases should be the subject of an evidentiary hearing to determine as a fact issue the intent of the parties at the time.

(2) Whether as a matter of fact Maple Island sold or transferred no part of its business or operations to Beatrice, which paid no money to purchase anything from Maple Island but rather served only as an available, alternate financing source for the various purchaser and acquired no interest but simply began to supply dairy products where Maple Island had previously; and,

(3) Whether Beatrice acquired any interest in the license for use of the Maple Island label.

Beatrice does not contest that Maple Island was the kind of dairy firm which the order prohibited acquiring. At first blush these assertions might appear to present questions of material fact but upon analysis it is clear they do not.

That the parties dispute the contest and meaning of the dispute the contest and meaning of the negotiations prior to the consent order is clear. The parties also differ as to their characterizations of the arrangement with Maple Island. But a defendant cannot create an issue of *material* fact requiring a jury trial simply by saying over and over that one exists. Defendant's claimed factual issues in Count I either are completely contradicted by a record consisting of documents primarily obtained from defendant's own files and by deposition testimony, or depend upon clearly inadmissible evidence or are legal conclusions.

Beatrice asserts that issues of material fact are raised concerning the meaning of the word "interest" in the order from statements made by FTC staff personnel during the pre-order negotiations after the original adverse order from the FTC and from the post order

conduct of the parties. Regarding the negotiations, Beatrice states that it was assured by FTC staff that "interest" was meant to be narrower in scope than the equivalent language in orders directed at three other major dairy companies.[8] Beatrice officers have so testified in deposition, and defendant asserts that such testimony is admissible to explain an ambiguous term, "interest," in the order, relying on numerous cases it asserts hold that consent orders or decrees are in the nature of private contract and the usual rules relating to use of parol evidence to explain ambiguities apply.[9]

[3] The government strongly opposes consideration of the negotiations behind the order and the court agrees. "Interest" is hardly new in the law. The precise phrase used in the order has been used in another consent decree recently construed by the Supreme Court.[10] Equally significant, the term has a fairly consistent, precise usage in relationship to property, businesses and other things of value.[11] For example, the Restatement, Property § 5 states:

> The word 'interest' is used in this Restatement both generically to include varying aggregates of rights, privileges, powers, and immunities, and distributively to mean any one of them.

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[8] All three other orders prohibited the acquisition of the ". . . stock, share capital or assets . . ." of other dairy firms for a ten year period. In the Matter of National Dairy Products Co. (FTC Docket 6651) Jan. 30, 1963, 62 FTC Decisions 120; In the Matter of the Borden Company (FTC Docket 7129), Jan. 30, 1963, 62 FTC Decisions 130; In the Matter of Foremost Dairies, Inc. (FTC Docket 6495), Mar. 5, 1965, 67 FTC Decisions 282.

[9] *E. g.*, Heights Funeral Home v. McClain, 288 S.W.2d 839 (Tex.Civ.App. 1956); *see generally*, 49 C.J.S. Judgments § 178.

[10] United States v. Armour & Co., 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

[11] See generally 22 Words & Phrases, p. 53 et seq.

Other examples of the consistent use of the term include the following:

> More particularly it [interest] means a right to have the advantage accruing from anything; *any right in the nature of property, but less than title* . . . . Black's Law Dictionary, Revised 4th Edition 950 (1968).
>
> In a contract of sale of a business providing that vendors agreed to sell and assign to purchaser all other interests which they may have in the business, the word "interest" meant a *valuable property or right, forming a part of the business sold,* a part of said business and its assets.
>
> The word "interest" when applied to property means the legal concern of a person in the thing or property, or in *the right to some of the benefits or used from which the property is inseparable.* Parsons v. Parsons, 141 P.2d 559, 561, 193 Okl. 160.

The foregoing clearly indicates that "interest" includes, by definition, the rights transferred here to Beatrice by Maple Island. The license to use the label,[12] the notes, distributorship agreements,[13] sales contracts and factor's liens are all "rights in the nature of property" and valuable rights forming a part of the business and in many instances comprising assets of Maple Island. Whereas before, Maple

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[12] United States v. Columbia Pictures, 189 F.Supp. 153 (S.D.N.Y. 1960); Western Geophysical Co. of America v. Bolt Associates, Inc., 305 F.Supp. 1248 (D.Conn. 1969.)

[13] The distributorship agreements included provisions that the distributor would handle Maple Island brand products exclusively in a territory described in that contract, giving the defendant first refusal in purchasing the distributor's business, a liquidated damages clause for any violation and a non-competition agreement. A handwritten note on defendant's own copy of a letter of inquiry sent by the FTC (Exhibit 34, Fox deposition Exhibit 41, Defendant's Ex. 14) contains the following notation, "we acquired distributorship contracts from Maple Island."

Island held all rights, privileges, powers, and immunities relating to the assets transferred, after the transfer, Beatrice held some of those rights and the independent *distributors* held the rest. And while the sales contracts, factor's liens and notes did not give Beatrice title, Beatrice clearly held a security *interest*, i. e., a right of ownership contingent upon the default of the titleholder. Such interests are no less interests within the terms of the order because contingent upon default of the debtor.[14] Perhaps most significant, prior to the transfer, Maple Island had the "rights to the benefits" inseparable from the property transferred, *i. e.*, the sales of its milk to the customers along Maple Island's former routes. After the transfer, Beatrice had those rights at least for the minimum period of the distributorship agreements and the advantage of an established and continuing relationship with the distributors. Beatrice thereby gained access to all or most of the customers—the sales volume[15]—who previously bought milk from Maple Island. The net result was an increase in gross sales of Russell Creamery in Superior alone of nearly $1 million, about 30%.

[4] The transactions thus constitute at least an indirect acquisition of an interest in violation of the order. It is at best disingenuous for Beatrice to contend that the particular "aggregate of rights, powers, privileges and immunities" transferred was not an interest in the milk distribution firm of Maple Island. The court should look to

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[14] Indeed, artful real estate lawyers have for centuries been creating interests much less valuable than those here transferred in the form of contingent remainders.

[15] The only case cited by either party relating to whether sales volume is an asset is that of United States v. ITT Continental Baking Co., Civil Action No. C 1220 (D.Colo. 8/2/71) (Exh. 48). There Judge Winner answered the question in the affirmative, stating, "I find that, particularly in businesses where route salesmen are involved, customer lists have a peculiar value, and that they frequently represent the principal asset of a business. . . . and these assets, the most important of which were sales routes and sales volume, were acquired."

the purpose of the FTC order, and what it was intended to accomplish.

The United States Supreme Court recently stated in United States v. Armour & Co., 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971):

> "The . . . scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." [Id. at 682, 91 S.Ct. at 1757]

Nothing in the remainder of the final Beatrice order contradicts the construction of the order here made by this court.[16]

[5] Moreover, if the parties had agreed to a consent order which permitted the acquisition of the sales volume of a firm while avoiding the corporate shell and the physical assets, they were certainly capable—after 11 years of litigation and negotiation—of drafting language less broad than that used here. The order is not ambiguous so as to allow admission of parol evidence of the pre-order negotiations. There is no suggestion that the agreement

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[16] Paragraph II, 2 of the order reads as follows:

> "By these divestitures no interest shall be sold or transferred, directly or indirectly to anyone who is at the time of the divestiture an officer, director, employee or agent of, or directly or indirectly under the control or direction of Beatrice. . . ."

The FTC opinion accompanying the order stated in part:

> "In the view of the majority of the Commission the proposed consent settlement achieves in large measure the original objective of the complaint which was to prevent the disappearance from the dairy industry of viable regional dairy companies."

Both paragraph II, 2 and the 10 year acquisition ban are consistent with that pose and use the same term. Paragraph II, 2 insures that the divestiture will not be illusory. The identical term is used to insure that other regional dairy companies will not be acquired. Defendant's construction would permit an illusory ban on acquisitions.

was not integrated in the order. Thus, the negotiations can provide no factual basis precluding summary judgment.

[6] Even assuming ambiguity in the word "interest" *arguendo,* defendant's contentions are not well founded. As noted 11 years of litigation preceded the modified order, including full hearings on both the question of antitrust violations and as to sanctions imposed. There is a full record of the hearings before the examiner, an opinion of the examiner, and two FTC opinions which provide ample assistance in construing the order, if clarification is needed.

The extensive quasi-judicial litigation before the FTC resulted in 51 pages of findings and an opinion by the Commission, detailing the anticompetitive effects of the mergers and acquisitions typifying the dairy industry in general and Beatrice's own growth in particular. When the modified order was entered by the Court of Appeals by consent, the FTC reiterated its view that the order accomplishes the objective sought in the previous findings and order, namely the prevention of the disappearance of regional dairy firms through acquisition by the multimarket giants such as Beatrice.[17] Thus, if the public record behind the order is consulted, it is clear that the acquisition of the sales volume by Beatrice and the loss of Maple Island as a competitor is the kind of event the order was intended to prevent.

Defendant's cited cases where the contents of negotiations behind an order were allowed are all, with one set of exceptions,[18] civil cases between private individuals and

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[17] *Compare* 68 FTC 1007 *with* page 3 of the opinion of the FTC accompanying its modified order of June 7, 1967 (quoted page 12, n. 16, *supra.*)

[18] United States v. Star-Kist Foods, Inc., 240 F.2d 759 (9th Cir. 1956); Commissioner of Internal Revenue v. Pacific Mills, Inc., 207 F.2d 177 (1st Cir. 1953); Milton S. Kronheim & Co. v. United States, 163 F.Supp. 620, 143 Ct.Cl. 390 (1958); American Brewery, Inc. v. United States, 223 F.2d 43 (4th Cir. 1955), rev'g 126 F.Supp. 477 (D.Md.1954).

are either divorce cases or relate to issues of *res judicata* or collateral estoppel, *clearly different from that here* where the issue is: What does the order prohibit the defendant from doing?; not what was decided. With the one exception described below no cases have been cited, and this court's research has revealed none, in which any court has accepted evidence relating to the negotiations between the staff of a public agency and a respondent in interpreting an order by the agency.

The exception is a line of tax cases involving prior efforts by the Office of Price Administration to recover overcharges and statutory penalties for violations of price control regulations. The OPA claims were settled by negotiation resulting in payment of a sum of money and the issue before the court in the tax cases was the deductibility of the payments. Deductibility turned on whether the payments included amounts for treble penalties which would indicate "willful" violation of the price control regulations, the deduction of which would not be allowable. The courts in each case admitted testimony regarding predecree negotiation as well as other evidence on the issue of willfulness. These tax cases are not point. The issue in those cases was akin to a *res judicata* problem, namely what issues were submitted and decided. Here the issue is the interpretation of the agency or court order.[19] One case which points to the proper resolution is Gila Valley Irrigation District v. United States, 118 F.2d 507, 510 (9th Cir. 1941), where the court held that evidence as to negotiations between the parties was inadmissible in interpreting a consent decree stating:

> Even if we assume that the terms of the decree were ambiguous, contrary to our conclusion, *evidence of*

[19] Whether the order here construed is considered a court order or as an order of the FTC would seem to be irrelevant; defendant has suggested no basis for distinction. Since the case was settled during the pendency of the appeal to the Circuit Court, however, it appears accurate to consider the order here as the order of the court, to be construed as other consent judgments.

> *negotiations leading up to the decree would not be admissible, for we are concerned not with the intention of the parties as in the case of a contract between them, but the intention of the court as expressed in the decree.* Moreover, if there was an error in the ruling it was not shown to be prejudicial for, in case of an ambiguity, the pleadings [*i. e.*, the official or public record] should be first consulted to resolve the ambiguity. [Emphasis added]

The *Gila Valley* rule appears particularly appropriate here.

The remaining alleged issue of material fact requires only summary treatment. It matters not whether Maple Island "sold" its business to defendant, although there is evidence that suggests a sale was made. The issue, disposed of above, is whether Beatrice *acquired* an interest in Maple Island or its business or assets. The issue as to whether Beatrice may have paid no money to *purchase* anything from Maple Island is similarly irrelevant.[20] The issue is one of *acquisition* by Beatrice whether by direct sale, or an indirect transaction. Clearly, there was a transfer of something of value to Beatrice.

[7] As to defendant's alleged lack of interest in the license for the Maple Island label, the law is clear that trademarks and labels are valuable business assets, and defendant's own documents reflect the defendant's belief that the label on a milk product is such.[21]

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[20] Already noted is the recitation of "for value received", the transfer of more than $230,000 from Beatrice to Maple Island, either directly or through the distributors, and the payment of interest by Beatrice's subsidiary to Maple Island.

[21] The letter of agreement (quoted in full, *supra*, pp. 6, 7) signed by Beatrice subsidiary is an example. Relevant excerpts include the following:

> "Since a substantial portion of this [sales] volume is packaged under our Maple Island private label *for which a consumer demand has been established. . . .*"

The court thus concludes that as to Count I there are no issues of material fact, and summary judgment is proper.

COUNT II

[8] Summary judgment is even more clearly proper as to Count II. Part I of the consent order required Beatrice to divest itself within 18 months ". . . of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at . . . Albuquerque, New Mexico; . . ." as part of the divestiture of a group of plants in the American Southwest. Defendant owned an 18½% stock interest in the Valley Gold Dairy Co. of Albuquerque, which was not divested until late 1969 or early 1970. The 18 month period expired on December 7, 1968. Defendant divested all of the other Southwest plants to a single purchaser. Following that action and in March, 1969, the FTC notified Beatrice that it was still obliged to divest the Valley Gold stock. A series of letters and conferences with FTC staff ensued. After denial by the FTC of defendant's request for an extension until August 1970, Beatrice formally requested the FTC approval of a purchaser for the stock in a letter received by the FTC on January 2, 1970. The government contends the divestiture was untimely as a matter of law. Defendant's contentions resisting the government position are considered *seriatim*.

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[21] (Continued)

> "You [Russell] also agree that you will do nothing to injure the *goodwill of the name* or jeopardize *its value*." [emphasis added]

Attached as an exhibit to defendant's compliance report to the FTC for 1970 is a letter to all diary plant division managers, dated 6/11/70, which states defendant's then current policy on private label agreements. The letter states in pertinent part,

> "Where Beatrice is having another processor or manufacturer custom pack Meadow Gold or our label products, we should have a similar written agreement to protect our valuable *trademarks* and reputation for quality." [Emphasis added]

Beatrice first argues that a jury must determine whether its stock interest was a "plant" within the meaning of the order, either because a stock interest is not literally a plant or because it was understood that Beatrice had to acquire all of the Valley Gold stock before the order was applicable to that interest. The order itself, however, speaks of plants owned ". . . in whole or in part . . ." in Albuquerque. Defendant's answer admits that it was required to divest itself of its interest in the Albuquerque Dairy plant within 18 months. The record reflects no other interest of any kind in any other dairy business in Albuquerque. Footnote 2 on page 2 of the FTC opinion of June 7, 1967 (which accompanied the consent order) states:

> "Beatrice is also divesting the Valley Gold operations in New Mexico . . . ."

A booklet describing defendant's Southwest Dairy Operations" and submitted to the FTC on 10/18/67 as part of defendant's compliance report contains the following statement (Exh. 60, p. 22):

> "Beatrice is offering its wholly-owned southwestern dairy operations as outlined above for sale at a price of 6,272,519. In addition Beatrice's 3,458 shares of Valley Gold common stock are available for purchase at $636,686. Pursuant to agreement with the Federal Trade Commission, the dairy properties are offered as a unit to a single purchaser."

Finally, if more proof be needed, defendant's own internal memorandum for Beatrice of July 16, 1969, from General Attorney John P. Fox, Jr. to William Karnes states:

> You are familiar with *the fact that* as to the divestiture provision of the consent decree in the Merger Case, *Beatrice is still under the obligation to dispose of our interest in Albuquerque.* This of course means some arrangement relative to our *3,458 shares of Valley Gold stock* (18.5% of the outstanding shares.) [Emphasis added]

In the face of such overwhelming documentary evidence, for defendant now to contend that its Valley Gold stock was outside the consent order is quite without merit. The only evidence offered to support this position is the fact that Beatrice and the then principal stockholder of Valley Gold had discussed, prior to the entry of the consent order, defendant's possible acquisition of his majority interest. The fact of such negotiations does not contradict the clear interpretation of the order as evidenced by the order itself, the accompanying FTC opinion, Beatrice's compliance report, and defendant's own internal memorandum. The first indication that the Valley Gold interest might not be subject to the order—anywhere in the record—was in defendant's briefs on the instant motion. As a matter of law the divestiture order clearly applies to the Valley Gold stock; there is no issue for a jury raised on this point.

[9-11] Equally groundless is defendant's contention that its efforts to dispose of the Valley Gold stock were in good faith and that a good faith effort to comply with the terms of the order is a complete defense. Assuming such good faith *arguendo*, that issue was passed upon by this court in a previous order, United States v. Beatrice Foods Co., 52 F.R.D. 14 (D.Minn.1971), where it was stated:

> . . . while good faith is not a defense to such an action, it is clearly relevant to the court's discretionary determination of the extent of civil penalties to be assessed under that provision. United States v. H. M. Prince Textiles, Inc., 262 F.Supp. 383, 388-389 (S.D.N.Y. 1966); United States v. Vitasafe Corp., 212 F.Supp. 397 (S.D.N.Y. 1962), *aff'd* 352 F.2d 62 (2d Cir. 1965). 52 F.R.D. 14, 18.

Similarly, defendant's arguments as to the alleged difficulty or impossibility of divesting the stock may have carried weight behind a request to modify the order, but they are not a defense to the action here.[22] Moreover,

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[22] St. Helen v. Wyman, 139 F.Supp. 545 (N.D. Calif. 1956), is not apposite. There the issue was whether the good faith attempts of certain army personnel to notify

defendant did in fact divest. Whether its negotiations over price with the ultimate purchaser were reasonable is irrelevant to whether the stock was *timely* divested. The good faith language in the order clearly applies not to defendant's *efforts* to divest, but to a requirement of actual rather than illusory divestiture. Neither the order itself nor its public record background, suggests anything to indicate that defendant's divestiture obligation under the order was to be affected by the price defendant received, and defendant's position in being forced to sell is no defense. Defendant's bargaining position may have been weakened by virtue of the order.[22] But any unequal

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[22] (Continued)

persons responsible for discharge of a soldier whose discharge had been temporarily restrained by a court were a defense to claims based on violation of the restraint. The case is distinguishable on three grounds. Firstly, the time within which the requisite notice could be given was apparently extremely short whereas here, defendant had more than 18 months to comply. Secondly, the restraining order was an attempt to maintain the status quo for a short time until the main issue could be litigated, under the court's general equity powers; good faith would be relevant to an equity claim. Here the order was the considered and negotiated product of 11 years of litigation, consented to by defendant. Thirdly, there were procedures established for modification of the order and time to use them if the difficulties were insuperable.

[23] Two cases cited by defendant as authority for its claimed defense of inability to comply, Healey v. United States, 186 F. 2d 164 (9th Cir. 1950), and Federal Trade Commission v. Blaine, 308 F.Supp. 932 (N.D. Ga. 1970), are instances where contempt citations were sought for failure to produce documents not shown to be in the possession or control of the defendants. The inability to comply was in each case actual rather than that here, i.e., the result of defendant's desire to get a better price. Similarly, there is no indication here, as in the strike case, Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R., 127 U.S.App.D.C. 23, 380 F.2d 570 (1967), that the third party whose cooperation was required for compliance was unwilling to deal with the party under the court's order.

bargaining position is the product of defendant's earlier found violations of the anti-trust laws and the resultant order consented to by defendant. Having consented, defendant may not now indirectly attack the order.[24] Here, defendant expected to get a price it desired. Because the ownership of the majority of the Valley Gold stock changed due to a death, leaving those expectations unfulfilled, defendant cannot now claim "foul". There is no issue of material fact raised by defendant's alleged good faith or inability to comply.

[12] Also groundless, is the assertion that by approving the sale of the other Southwest plants as a unit, the FTC impliedly agreed that the Valley Gold stock need not be divested and is therefore estopped from claiming, or has waived its right to claim, that defendant violated the order. Defendant cites no authority, the record is devoid of evidence to support such a claim, and defendant's own internal documents reflect its continuing awareness of its obligation. The fact that Beatrice may have *inferred* briefly that the FTC was no longer interested in the Valley Gold stock is irrelevant. The order makes explicit provision for divestiture. There is no material issue of fact on the issue of waiver or estoppel.

[13] Defendant claims that it was given an oral extension of time for compliance by FTC staff until August, 1970. At most, however, the testimony of the defendant's officers supports only the conclusion that FTC staff advised defendant to apply for an extension and that, if one was applied for, the staff would support it. (See Fox deposition, pp. 37-42.) And the record is clear that defendant knew that, however influential the staff may be in

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[24] United States v. Vitasafe, *supra*, and United States BioGenics Corp. v. Christenberry, 173 F.Supp. 645 (S.D. N.Y. 1959), *aff'd* 278 F.2d 561 (2d Cir. 1960). The FTC opinion accompanying the consent order states that divestiture of the Valley Gold and other Southwest operations was in place of defendant's Idaho division and part of its Utah division which were ordered to be divested under the appealed order.

FTC decisions, the staff had no authority to make a decision as to an extension. There is no evidence to support either actual or apparent authority in the staff. To the contrary, Beatrice applied formally for a one year extension; the FTC responded formally by granting defendant two months to present a suitable purchaser, until November 15, 1969.[25] There was no one-year extension. It is clear to the court that there is no issue of material fact on this issue.

[14] Defendant argues that the FTC letter of September 12th, which gave Beatrice two months to "present a suitable purchaser" for approval, established a requirement less than full divestiture. Since, it is argued, the FTC knew of the negotiations with the ultimate purchaser, and had made inquiry about it, defendant had substantially complied with the November 15th deadline. The record belies this claim. The earliest possible presentment of a purchaser was, by any view of the facts, no earlier than the letter to the FTC dated December 19, 1969. That letter indicated agreement with the estate of one Price had been reached. The contracts were not executed until December 24, 1969, however, and a formal request for approval of the FTC was not sent until December 30, 1969, received on January 2, 1970. Whether the suitable purchaser was presented on December 19, 1969, January 2, 1970 or any date between, it is clear that none was presented by the November deadline. The violation of the order, even if considered as extended two months in some manner, clearly occurred and the precise date of presentment is relevant only to the question of penalties. Again there is no issue of material fact, only disputes as to the legal conclusions to be

[25] The government argues that no extension was given by its letter of September 12, 1969, but rather only a period of grace as to enforcement of the order. The text of the September 12th letter supports that contention. Since the government is claiming penalties only for the period after November 15th, however, the court need not determine whether what the Commission did was *de facto* an extension.

drawn from those facts. Summary judgment is appropriate as to Count II.

CONCLUSION

As the foregoing indicates somewhat *in extenso*, defendant has raised no issue of material fact necessitating a trial. As to Count I, the unchallenged documentary evidence shows that Beatrice "acquired" an "interest" in Maple Island Dairies. As to Count II, the evidence is quite clear that Beatrice's divestiture of the Valley Gold stock was untimely. Both are violations of the order entered on June 7, 1967. Summary judgment in favor of the government on the issue of defendant's liability is therefore appropriate.

On the question of the penalties which should be imposed for the violations of the FTC order by Beatrice, the court should like to hear further from counsel for the parties, before ordering the entry of judgment and accordingly has set a hearing date for consideration thereof in a separate order which has been entered.

APPENDIX C

UNITED STATES of America,
Plaintiff,

v.

BEATRICE FOODS COMPANY,
Defendant.

No. 4-70 Civ. 459.

United States District Court,
D. Minnesota,
Fourth Division.

Dec. 26, 1972.

Robert G. Renner, U.S. Atty., by Neal J. Shapiro, Asst. U. S. Atty., together with Joseph J. Gercke, Federal Trade Commission, Washington D. C., for plaintiff.

Winston, Strawn, Smith & Patterson, by Ronald Butler, Chicago, Ill., for defendant.

ORDER FOR CIVIL PENALTIES AND DIVESTITURE

NEVILLE, District Judge.

This case has been before the court twice before. See United States v. Beatrice Foods Co., 52 F.R.D. 14 (D. Minn. 1971). A detailed statement of the facts can be found in a later order of this court reported in United States v. Beatrice Foods Co., 334 F.Supp. 104 (D.Minn. 1972). There defendant was found guilty of violating a cease and desist and divestiture order of the Federal Trade Commission. Thereafter the court held a hearing on the question of penalties to be imposed.

Robert G. Renner, United States Attorney, by Neal J. Shapiro, Esq., Assistant United States Attorney, together

with Joseph J. Gercke, Esq., Federal Trade Commission, appeared for the plaintiff; Winston, Strawn, Smith & Patterson, Chicago, Illinois, by Ronald Butler, Esq., appeared for the defendant.

Defendant has requested an evidentiary hearing on the issue of penalties to be imposed to the end that it might have an opportunity to present evidence of its alleged good faith in taking the actions it did and which this court held to be violative of the Trade Commission order. This court has read the exhaustive briefs filed by both parties, is familiar with and has read portions of various depositions and does not believe that an evidentiary hearing is necessary or required or would be of any help to the court. In its order of June 15, 1972 the court ruled that under the circumstances of this case any claimed misunderstanding or misinterpretation of the meaning of language contained in the Trade Commission Order (which in its final form is the exact counterpart of an order of the Court of Appeals for the Ninth Circuit) could not be shown or asserted as a defense to its violation. The court did rule however it could consider evidence of defendant's claimed good faith on the issue of penalties to be imposed to weigh such against the government's contention of a wilful and deliberate violation of the Order. The court has given consideration thereto.

The statutes involved, 15 U.S.C. § 21(*l*) and § 45(*l*), are much the same and read as follows:

15 U.S.C. § 21(*l*)

"Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in

the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

15 U.S.C. § 45(*l*)

"Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

As to the Count I violation, illegal acquisition of an interest in Maple Island Dairy, the government prays $5,000 a day penalty from September 1, 1968 through the date of filing the complaint herein, October 23, 1970, a total of $3,910,000. As to Count II, failure timely to divest Valley Gold Dairy Co. stock, the government requests similar daily penalties from September 12, 1969 through January 3, 1970, a total of $565,000. The complaint alleges and there has been no denial thereof that defendant is "one of the largest manufacturers, processors and distributors of dairy products in the United States" and that its consolidated revenues for the fiscal year ending February 28, 1969 were in excess of One Billion, Three Million dollars. It is further alleged, though not completely substantiated, that by the acquisition of Maple Island Dairy it acquired an annual sales volume in excess of $1,000,000. The government argues that to impose but a nominal penalty would merely constitute a license fee for defendant's transgressions, contrary to Congressional intent

that the penalties be sufficient to serve as a deterrent to further and other violations of the orders of the Federal Trade Commission. As to the failure to divest charge, the court is willing to assume the applicability of the shorter period from November 15, 1969 to January 3, 1970, a total of some 49 days as the period during which defendant was in violation of the Trade Commission Order. The court has some sympathy as a business proposition with defendant's difficulty in finding a ready market for a minority stock interest in a closed corporation, particularly where the principal stockholder of the corporation became deceased. The court also recognizes defendant did divest itself of its other properties as required and eventually of the Valley Gold stock, though some 49 days too late and beyond the last extension of time.

[1] The government's requests seem to the court to be excessive. The court is of the belief, particularly in view of the divestiture herein required, that a penalty of $156,400 or $200 per day for the violation as alleged in Court I of the complaint and $9,800, at the same daily rate, for the violation asserted in Count II of the complaint is appropriate, non-confiscatory and yet sufficient to command defendant's respect and attention and something substantially more than a mere license fee. The court cannot find defendant exculpated by its claimed good faith and believes the above penalties are warranted in the premises.

[2] The government further requests that this court enter a divestiture order to undo the results of the violation defendant committed by acquiring illegally an interest in Maple Island Dairy. The complaint herein was filed over two years ago and defendant meantime has continued to enjoy the acquired sales volume and such other benefits of the illegal acquisition as there might be.

The court believes it has the power and authority to enter such an order under its general equity powers. There are a number of cases, though not directly involving the

same facts as in the case at bar, which augur for such a holding. See Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L. Ed. 1332 (1946); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S. Ct. 332, 4 L.Ed.2d 323 (1960); Shafer v. United States, 229 F.2d 124, 128 (4th Cir. 1956); United States v. Schine, 260 F.2d 552 (2d Cir. 1959); United States v. H. M. Prince Textiles, Inc., 262 F.Supp. 383, 389 (S.D.N.Y. 1966); *contra* Herbold Laboratory, Inc. v. United States, 413 F.2d 342 (9th Cir. 1969) (dicta). The statute above quoted and here applicable, though making no mention thereof, does not attempt to limit the exercise of the court's general equitable powers and if the court fails to grant equitable relief the illegal violation will continue unabated and the Federal Trade Commission's injunctive cease and desist order will be thwarted and become unenforceable, since the Federal Trade Commission in an instance such as here has no enforcement powers *per se* except through the courts Congress could not have so intended.

An affidavit submitted by defendant states that after September 1, 1968 Maple Island Dairy terminated supplying dairy products to 26 locations in its so-called northern division. Defendant's subsidiary commenced supplying 19, but the other 7 outlets were closed. Of the original 19, 7 have switched to a competitor. Eight of the remaining 12 are independent distributors. Sales volume from the entire acquisition, which of course is not equivalent in any sense to profit, has dropped to under one-half million per year on the average. Under these circumstances, a divestiture would not seem to wreak irreparable havoc on defendant and its subsidiaries, and equitable considerations call for such relief.

On the basis of the above and on all of the files, records and proceedings herein,

It is ordered that the clerk of court shall enter judgment for civil penalties in favor of plaintiff and against defendant in the amount of $166,200, to be satisfied and paid within 60 days from the date of this order by payment

through the office of the clerk of this court to the Treasury of the United States.

It is further ordered that within a period ending not later than September 1, 1973, defendant, its agents and subsidiaries shall divest themselves absolutely and outright in good faith of all rights, titles, interests, assets and facilities including the use thereof, directly or indirectly acquired by defendant or its agents and subsidiaries in the former so-called northern division or area of Maple Island Dairy as the result of, and arising out of, its arrangements, contracts, or agreements or those of defendant's agents and subsidiaries, with Maple Island Dairy or others. The divestiture shall be made with and subject to the approval of this court. A comprehensive plan therefor and containing a description of the means for the doing of such shall be submitted to the court with copy to the Federal Trade Commission within 60 days from date of this order. Any plan for divesture shall be designed to protect the interests of financially affected third parties, consumers and the public. The court retains jurisdiction on noticed motion to modify this divestiture order in any such way as may be required or warranted in the premises.

Let judgment be entered accordingly.

APPENDIX D

In the Matter of
Beatrice Foods Co.
Docket 6653
Initial Decision by John Lewis, Hearing Examiner
March 2, 1964

(The Statement of Proceedings, Findings of Fact, Conclusions, Final Conclusions of Law and The Remedy appearing at 67 FTC 483-695 have been omitted)

ORDER

It is ordered, That respondent, Beatrice Foods Co., a corporation, and its officers, directors, agents, representatives and employees, shall, within one (1) year from the date this order shall become final, divest itself absolutely, in good faith, of all stock, assets, properties, right and privileges, tangible or intangible, including, but not limited to, all contract rights, plants, machinery, equipment, trade names, trademarks, and good will acquired by Beatrice Foods Co., as a result of the acquisition of the stock, share capital, or assets of each of the following named corporations: Creameries of America, Inc. and its subsidiaries, Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd., together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description that have been added to or placed on the premises of each of the former above named corporations by respondent, as may be necessary to restore each of them as a going concern and to establish each of them as an effective competitor in substantially all the same basic lines of commerce in which each of the respective acquired corporations was engaged at the time of its acquisition.

Pending divestiture, respondent shall not make any changes in any of the above-mentioned plants, machinery, buildings, equipment, or other property of whatever description, which shall impair their present rated capacity for the production of their respective dairy products, or their market value, unless said capacity or value is restored prior to divestiture.

Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, acquired, added, modified or placed on the premises of any of the above-named concerns by respondent, to anyone who, at the time of divestiture, is a stockholder of respondent, or to anyone who is or, at the time of acquisition, was an officer, director, representative, employee, or agent of, or otherwise, directly or indirectly, connected with, or under the control or influence of, respondent.

It is further ordered, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is a substantial factor in the dairy products industry, if the effect of such sale or transfer might be to substantially lessen competition or tend to create a monopoly or oligopoly in any one of the said dairy products, in any section of the country.

It is further ordered, That the complaint herein be, and it hereby is, dismissed insofar as it alleges that respondent acquired dairy product concerns, other than those hereinabove specifically mentioned, in violation of Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

It is further ordered, That respondent, Beatrice Foods Co., shall, within such time as may be fixed by order of the Federal Trade Commission, submit in writing for

the consideration and approval of the Commission, its plan for carrying out the provisions of this order, such plan to include the date within which full compliance may be effected.

It is further ordered, That for a period of ten (10) years from the date this order shall become final, respondent, Beatrice Foods Co., shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any domestic concern, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States in the business of manufacturing, processing or selling at wholesale or on retail milk routes (a) fluid milk, (b) ice cream, ice milk, mellorine, sherbets or water ices, (c) natural or processed cheese, or (d) butter, without the prior approval of the Federal Trade Commission.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of Beatrice Foods Company, a corporation.	Docket No. 6653 Final Order

Pursuant to the Commission's order of April 26, 1965, complaint counsel and respondent have submitted their views on the form and content of an appropriate order. The Commission has fully considered these views and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in the light of the Commission's decision in this matter and is required by the public interest, and that it should be adopted and issued forthwith as the Commission's final order. Accordingly,

IT IS ORDERED that:

I.

Respondent Beatrice Foods Company, within a period not exceeding eighteen (18) months after the service upon it of this order, shall divest itself absolutely and in good faith of all stock, assets, properties, rights, and privileges, tangible or intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trademarks and good will, acquired by respondent as the result of its acquisitions of the stock, share capital, or assets of Creameries of America, Inc., and its subsi-

diaries, Greenbrier Dairy Products Company, Community Creamery, and Durham Dairy Products, Inc., which are now used in the businesses so acquired, together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description, which have been added to the property of the above-named acquired firms, or placed on such premises by respondent, and which are now used in the businesses so acquired, in such manner as to restore each of them as going concerns in the manufacture, processing, distribution and sale of fluid milk, ice cream, and frozen desserts, to the extent that each of said acquired firms was engaged in any of those lines of commerce at the time of its acquisition.

II.

By such divestitures, as set forth in Section I above, respondent shall not sell or transfer, directly or indirectly, any of said stock or assets to anyone who is at the time of divestiture an officer, director, employee or agent of, or under the control or direction of, respondent or any of its subsidiaries or affiliates, or to any person who owns or controls more than one percent (1%) of the outstanding shares of common stock of respondent, or any of its subsidiaries or affiliates, or to anyone who is not approved as a purchaser by the Federal Trade Commission in advance.

III.

Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment, or other properties of whatever description, which would impair their capacity for the manufacture, processing, distribution or sale of fluid milk, ice cream or frozen desserts, or their market value, unless said capacity or value is restored prior to divestiture.

IV.

Respondent shall divest itself of the above-identified assets in the following manner and subject to the following conditions:

A. Beginning promptly after the effective date of this order, respondent shall make diligent efforts in good faith to sell the above-identified assets in the manner set forth in Section I above and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of eighteen (18) months.

B. Within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until it has fully complied with this order respondent shall submit in writing, to the Federal Trade Commission, a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. All compliance reports shall include, but not be limited to, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested, the identity of all such potential purchasers, and copies of all written communications to and from all such potential purchasers.

C. If complete divestiture shall not have been accomplished within the aforesaid period of eighteen (18) months, the Commission will give respondent notice and afford it an opportunity to be heard before the Commission issues any further order or orders which may be necessary or appropriate to achieve full compliance with this order.

V.

For a period of ten (10) years from the effective date of this order respondent shall cease and desist from acquiring, directly or indirectly, by any device, or through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets (other than products sold in the course of business), of any firm engaged in any state of the United States or in the District of Columbia, in the manufacture, processing, distribution or sale of fluid milk, ice cream or other frozen desserts, without the prior approval of the Federal Trade Commission.

By the Commission, Commissioners MacIntyre and Jones not participating.

Joseph W. Shea,
Secretary.

ISSUED: December 10, 1965

OPINION ACCOMPANYING FINAL ORDER

By the Commission:

On April 26, 1965 [67 F.T.C. 473], the Commission determined that respondents' acquisitions of Creameries of America, Inc., Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd.,[1] were unlawful under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). However, the Commission deferred entry of a final order pending receipt of the parties' views on the form and content of an appropriate order. Those views have been received and the Commission is now ready to formulate a final order that will provide effective and equitable relief against the adverse consequences of respondents' unlawful conduct.

In formulating relief, the Commission has considered the public interest in the restoration and maintenance of competition in the dairy industry, and in the markets directly affected by the illegal acquisitions, the need to harmonize, insofar as the facts permit and the public interest requires, the order entered against respondent with those which have already become effective against other leading dairy firms, and the practical problems and difficulties which might be involved in using the remedy of divestiture to restore and maintain competition.

The Commission has concluded, first, that to provide effective relief, divestiture of the assets acquired from Creameries of America, Inc., Durham Dairy Products, Inc., Greenbrier Dairy Products Company, and Community

[1] The assets of Dahl-Cro-Ma, Ltd., were destroyed by a tidal wave subsequent to their acquisition.

Creamery is essential. Divestiture is the normal, and usually the most appropriate, remedy for removing the adverse consequences of Section 7 violations. (*United States* v. *E. I. DuPont deNemours & Co.*, 366 U.S. 316, 326-31) The Commission finds that remedy especially appropriate here. As pointed out in our decision, the acquisitions of Creameries of America, Inc., Durham Dairy Products, Inc., and Greenbrier Dairy Products Company eliminated from already concentrated local markets just the kind of substantial and viable local dairy companies whose continued existence is so vital to competition in this industry. This was true of all the local markets involved in these acquisitions. The acquisitions, by substituting respondent, a powerful national organization already well entrenched in many markets, are also likely to substantially increase the difficulty of new entry into these concentrated markets. Moreover, in each of the markets involved, except possibly the Hawaii market involved in the Creameries acquisition,[2] these acquisitions eliminated substantial and important potential competition. The acquisition of Community Creamery, a horizontal acquisition, increased concentration in an already concentrated market. In these circumstances, we find that divestiture of the acquired properties and the reestablishment of the acquired firms as independent, viable competitors is the only remedy likely to dispel the anticompetitive effects of the acquisitions in each of the markets involved.

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[2] The acquisition of Creameries' Hawaiian assets had other substantial and equally important anticompetitive effects. The market was already highly concentrated. The Creameries' subsidiary acquired had 60% and 50% of the fluid milk and ice cream markets respectively. The substitution of respondent is likely to further increase the difficulty of new entry, as well as to diminish the desire of the few existing local firms to offer vigorous competition. Moreover, the substantial market power acquired by respondent in Hawaii adds to respondent's capacity to repel competition and new entry in other markets.

We have considered the problems which respondent suggests would be involved in divestiture of some of the properties, but we do not think that any of them is sufficient either to outweigh the need for divestiture or to pose a barrier to the practical effectuation of divestiture. We note that in each market involved respondent is maintaining and using the acquired facilities in substantially the same manner as acquired, or where it has rebuilt or substituted other facilities, has nevertheless maintained them as separate operations. There appear to be two exceptions. In California, respondent has apparently completely divested itself of part of the business and facilities acquired from Creameries. With respect to the facilities acquired from Durham Diary, respondent informs us that it maintains the fluid milk operations as acquired, but has divested itself of the local ice cream facilities, and now services the ice cream market in that area from its own plants. The order requires only that respondent divest itself of assets and additions thereto now in use, and necessary to reestablish the acquired firm as a going concern in the fluid milk, ice cream and frozen dessert lines. The order would thus raise no problems with respect to those California operations from which respondent has apparently withdrawn, but would only require the divestiture of assets which are currently being used. With respect to Durham Dairy, the order would, of course, require divestiture of the fluid milk operations which respondent has operated and maintained as originally acquired; if it appears during the course of compliance proceedings that respondent is unable to reestablish Durham as a going concern in the ice cream business, the Commission could relieve respondent of its obligation to do so.

Respondent also suggests that a variety of problems will render it difficult to divest, or, in some circumstances, to find a purchaser satisfactory to the Commission. At the present time, we think these contentions are too speculative; under the order respondent will be entitled to raise these problems with the Commission in

the event that its diligent and good faith efforts to effectuate a sale to a satisfactory purchaser should prove unavailing.

Finally, respondent urges that divestiture of the Hawaii assets acquired from Creameries' subsidiary would inflict a hardship upon it and would not be in the public interest because these operations are part of respondent's commitment to the Department of Defense to furnish dairy products to the armed forces in the Far East. Respondent entered into this commitment in 1964; it runs for approximately four more years. The hearing examiner's order which would have required respondent to divest these assets was filed on March 2, 1964. Although it is not clear whether respondent entered into its commitment with the Department of Defense before or after the order was filed by the examiner, respondent was obviously aware of the contingency of divestiture when it entered into its commitment with the Department of Defense. In any event, we are not convinced, and respondent does not state, that should it be required to divest its Hawaiian assets, its military commitments could not otherwise be fulfilled. We find that on balance the public interest requires divestiture of these assets.

The Commission also finds that full and adequate protection of the public interest requires the imposition of a 10-year ban on all future acquisitions by respondent of firms engaged in the manufacture, processing, sale or distribution of fluid milk, ice cream, or other frozen desserts, except upon prior approval of the Commission. As pointed out in our decision, respondent and several other large national dairy companies have embarked on extensive and far-reaching programs of acquisitions whose effect has been the substantial increase of concentration in the industry, and the elimination of a middle tier of local or regional companies capable of furnishing effective competition. The mergers also eliminated respondent and other leading dairy firms as sources of potential competition in these concentrated local markets. If com-

petition in this industry is to be restored and maintained, it is essential that this continuing elimination of viable local or regional competitors through acquisition be halted now and that respondent be restored as a potential competitor by precluding it from entering local markets by acquisition. See *Ekco Products Co.*, Docket No. 8122 (Opinion Accompanying Final Order, issued June 30, 1964) [65 F.T.C. 1163, 1204]. Moreover, as respondent itself points out, there are many practical barriers to the restoration of acquired firms as effective competitors through divestiture, years after a merger has occurred. Prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential if the Congressional policy expressed in Section 7 of the Clayton Act is to be effectively carried out in this industry. In recognition of these facts, the Commission has already imposed bans on future acquisitions by respondent's leading competitors. *Foremost Dairies, Inc.*, Docket No. 6495 (Modified Order, issued March 5, 1965) [67 F.T.C. 282]; *Borden Company*, Docket No. 6652 (Order Accepting Agreement Containing Order to Cease and Desist, issued April 15, 1964) [65 F.T.C. 296]; *National Dairy Products Corporation*, Docket No. 6651 (Order Waiving Notice and Accepting Agreement Containing Order to Cease and Desist, issued January 30, 1963) [62 F.T.C. 120]. Such a ban, especially in view of respondent's demonstrated proclivity to expansion through acquisition, is no less necessary here.

Commissioners MacIntyre and Jones do not participate.

Final Order

Pursuant to the Commission's order of April 26, 1965 [67 F.T.C. 473], complaint counsel and respondent have submitted their views on the form and content of an appropriate order. The Commission has fully considered these views and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in the light of the Commission's decision in this matter and is required by the public interest, and

that it should be adopted and issued forthwith as the Commission's final order. Accordingly,

It is ordered, That:

I

Respondent Beatrice Foods Company, within a period not exceeding eighteen (18) months after the service upon it of this order, shall divest itself absolutely and in good faith of all stock, assets, properties, rights, and privileges, tangible or intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trademarks and good will, acquired by respondent as the result of its acquisitions of the stock, share capital, or assets of Creameries of America, Inc., and its subsidiaries, Greenbrier Dairy Products Company, Community Creamery, and Durham Dairy Products, Inc., which are now used in the businesses so acquired, together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description, which have been added to the property of the above-named acquired firms, or placed on such premises by respondent, and which are now used in the businesses so acquired, in such manner as to restore each of them as going concerns in the manufacture, processing, distribution and sale of fluid milk, ice cream, and frozen desserts, to the extent that each of said acquired firms was engaged in any of those lines of commerce at the time of its acquisition.

II

By such divestitures, as set forth in Section I above, respondent shall not sell or transfer directly or indirectly, any of said stock or assets to anyone who is at the time of divestiture an officer, director, employee or agent of, or under the control or direction of, respondent or any of its subsidiaries or affiliates, or to any person who owns or controls more than one percent (1%) of the outstanding shares of common stock of respondent, or any of its subsidiaries or affiliates, or to anyone who is

not approved as a purchaser by the Federal Trade Commission in advance.

III

Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment, or other properties of whatever description, which would impair their capacity for the manufacture, processing, distribution or sale of fluid milk, ice cream or frozen desserts or their market value, unless said capacity or value is restored prior to divestiture.

IV

Respondent shall divest itself of the above-identified assets in the following manner and subject to the following conditions:

A. Beginning promptly after the effective date of this order, respondent shall make diligent efforts in good faith to sell the above-identified assets in the manner set forth in Section I above and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of eighteen (18) months.

B. Within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until it has fully complied with this order, respondent shall submit in writing, to the Federal Trade Commission, a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. All compliance reports shall include, but not be limited to, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested, the identity of all such potential purchasers, and copies of all written communications to and from all such potential purchasers.

C. If complete divestiture shall not have been accomplished within the aforesaid period of eighteen (18) months, the Commission will give respondent notice and afford it an opportunity to be heard before the Com-

mission issues any further order or orders which may be necessary or appropriate to achieve full compliance with his order.

V

For a period of ten (10) years from the effective date of this order respondent shall cease and desist from acquiring, directly or indirectly, by any device, or through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets (other than products sold in the course of business), of any firm engaged in any state of the United States or in the District of Columbia, in the manufacture, processing, distribution, or sale of fluid milk, ice cream or other frozen desserts, without the prior approval of the Federal Trade Commission.

Commissioners MacIntyre and Jones not participating.

APPENDIX F

Beatrice Foods Co. v. Federal Trade Commission.

In the United States Court of Appeals for the Ninth Circuit. No. 20,727. Dated May 23, 1967.

For the petitioner: Thomas A. Reynolds, and Edward L. Foote of Winston, Strawn, Smith & Patterson of counsel, Chicago, Ill. John P. Fox, Jr., General Attorney.

For the respondent: Claude N. Rosenberg, and William G. Fleckles of Bacigalupi, Elkus, Salinger & Rosenberg of counsel, San Francisco, Cal. J. B. Truly, Assistant General Counsel, Frederick H. Mayer, and Richard C. Foster.

Before CHAMBERS, BROWNING and DUNIWAY, Circuit Judges.

Final Decree

Upon consideration of the point motion and affidavits filed by Petitioner Beatrice Foods Co. and Respondent Federal Trade Commission May, 1967 and with the consent of both parties.

It is ordered, adjudged and decreed that the order of the Federal Trade Commission issued on December 10, 1965, against Beatrice Foods Co. be, and it hereby is, modified to read in its entirety as follows:

It Is Ordered that:

I.

[*Divestiture*]

Beatrice Foods Co., ("Beatrice"), within a period not exceeding eighteen (18) months from the effective date of this order, unless extended, shall divest itself absolutely in good faith to a purchaser approved in advance by the

Commission, of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at Pasadena, California (two plants); Cedar City, Utah; El Paso, Texas; Roswell, New Mexico; Albuquerque, New Mexico; all locations in the State of Arizona; and Morgantown, West Virginia, and which are engaged in the manufacturing, processing or distribution of pasteurized and homogenized milks, buttermilks, skim milks, cream, half & half, sour cream, cottage cheese, ice cream, ice milk, mellorine-type products, sherbet, or water ices, together with all assets, properties and businesses which are or may be used or conducted by Beatrice at or in conjunction with said plants, or added to said plants or utilized in replacement of said plants by Beatrice, as may be necessary to restore the properties as competitive entities, all as hereinafter provided.

Provided, however, that this order does not require that the plant, assets, properties and businesses located at Morgantown, West Virginia, be sold to the purchaser of the other plants, assets, properties and businesses described above.

Provided further, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith effort it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.

As used in this order the term "assets, properties and businesses conducted by Beatrice at or in conjunction with said plants" shall include all dairy distribution stations and branches regardless of where located, which are owned in whole or in part by Beatrice or operated by Beatrice and supplied by any of said plants.

II.

[*Method of Divestiture*]

Such divestitures shall be effected subject to the following:

1. Upon the completion of such divestitures to the purchaser or purchasers (herein called the "transferee"), Beatrice, its officers, directors, agents, representatives, or employees shall not exercise any control or supervision over the policies, control, management, operation or acts of transferee, or any successor in interest to transferee: *Provided,* that where necessary for the successful operation of the business of the transferee, Beatrice may license for a limited period of time the use of any of its trademarks or trade names in the territory of the transferee subject to the prior approval by the Commission of each license and the terms thereof.

2. By these divestitures no interest shall be sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or directly or indirectly under the control or direction of Beatrice or any of Beatrice's divisions, subsidiaries or affiliated corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Beatrice without the prior approval of the Commission.

III.

[*Future Acquisitions*]

Beatrice shall cease and desist, for a period of ten (10) years from the effective date of this order from acquiring, directly or indirectly, any interest in any firm, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any State of the United States or in the District of Columbia in the business of manufacturing, processing or dis-

tributing at wholesale or on retail milk routes any of the products described in Paragraph I of this order, without the prior approval of the Commission.

IV.

[*Reports*]

Beatrice shall submit to the Commission every ninety (90) days a report in writing setting forth its efforts and progress in carrying out the divestiture requirements of this order until all assets have been divested with the approval of the Commission; and Beatrice shall submit to the Commission on the first day of each calendar year a report in writing setting forth its compliance with the cease and desist provisions of this order.

V.

[*Proposed Purchasers*]

Beatrice shall notify the Commission of the names and addresses of all persons, firms or corporations who shall express to Beatrice any interest in purchasing the plants, assets, properties or businesses to be divested under the terms of this order, within thirty (30) days after having been informed of such interest.

It is further ordered, adjudged, and decreed that the order of the Federal Trade Commission, as so modified, be, and it hereby is, affirmed and enforced, and that petitioner be, and it hereby is, ordered to obey and comply with the terms of the order as so modified.

APPENDIX G

In the Matter of
BEATRICE FOODS CO.

Modified Order, Opinions, Etc., In Regard To The Alleged Violation Of The Federal Trade Commission Act And Sec. 7 Of The Clayton Act

Docket 6653. Complaint, October 16, 1965—

Decision, June 7, 1967

STATEMENT OF THE COMMISSION

A majority of the Commission has agreed to present to the Ninth Circuit for its consideration a proposed consent settlement of the Commission's Section 7 proceeding against *Beatrice Foods Co.*, Dkt. No. 6653.

Complaint in this matter was filed October 16, 1956. Five of the 175 acquisitions[1] charged in the complaint as illegal were found by the hearing examiner to be in violation of Section 7. His decision, rendered on March 2, 1964, was sustained by the Commission in an opinion issued on April 26, 1965 [67 F.T.C. 473, 697]. The final order entered by the Commission on December 10, 1965 [68 F.T.C. 1003], required divestiture within 18 months of four of the five acquisitions found to have been illegal and prohibited Beatrice from making any further acquisitions of dairy companies without Commission approval for a period of 10 years.

This order and the Commission's decision, finding liability, is now on appeal to the Ninth Circuit. The

[1] Of these acquisitions 77 were challenged under Section 7 and the remaining 98 under Section 5, either because the companies were not corporations or were not in commerce.

printing of the record is not yet complete, final briefs have not been exchanged, and oral argument has not yet been scheduled.

The consent order now agreed to by the parties resulted from renewed negotiations instituted in February 1967 at the request of respondent's counsel and participated in by the Commission and its staff and Beatrice.

Under the consent offer now proposed Beatrice agrees to divest itself of plants and related facilities located in Pasadena, California; Cedar City, Utah; Las Vegas, Nevada; El Paso, Texas; Roswell and Albuquerque, New Mexico; and all operations in Arizona. These operations span a distribution area stretching across the Southwest United States and encompass West Texas, New Mexico, Arizona, southern California, southern Nevada and southern Utah. The settlement also calls for the divestiture of the acquired company in Morgantown, West Virginia, and prohibits Beatrice from acquiring any other dairy company without Commission approval for a 10-year period.[2] The properties subject to divestiture under this settlement, with the exception of the Morgantown operation, are contiguous and capable of being sold as a single property to a single company. The divestiture contemplated by the settlement accounts for approximately 24 percent of the total premerger sales challenged in the complaint and is thus roughly comparable to the consent settlements agreed to with Foremost, Borden and National Dairy which divestitures involved 36%, 25% and 32% respectively of

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[2] Under this consent order Beatrice agreed to sell off its plant in Morgantown, West Virginia instead of the acquired plant in Durham, North Carolina. Beatrice is also divesting the Valley Gold operations in New Mexico and the Las Vegas, Nevada and Glendale, Arizona facilities which were not under the December order, in place of its Idaho division and the remainder of the Utah division which were under the December order.

premerger sales of acquired firms.[3] If the illegal acquisitions which Beatrice has already disposed of are taken into account, Beatrice will have eventually divested itself of 32% of the premerger sales acquired.

In considering any settlement proposal the Commission must seek to weigh the relative gains for the public interest between the certainty of immediate divestiture of named plants which the settlement achieves and the always uncertain contingency of court victory, the time will elapse before final court decision and the possible effect which such delay will have on the continued viability—and indeed on the continued existence—of the properties which can reasonably be expected to be subject to an eventual court-ordered divestiture.[4]

In the view of majority of the Commission the proposed consent settlement achieves in large measure the original objective of the complaint which was to prevent the disappearance from the dairy industry of viable regional dairy companies. The effect of the proposed settlement, if dives-

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[3] Each of the cases was settled on consent. *Borden* (Dkt. 6652) [65 F.T.C. 296] and *National Dairy* [Dkt. 6651] on April 15, 1964 and and January 30, 1963 [62 F.T.C. 120], respectively, prior to any hearing, and *Foremost* [Dkt. 6495] on March 5, 1965 [67 F.T.C. 282], after full hearings and an opinion by the Commission finding violation.

[4] In this connection we cannot ignore the fact that since complaint issued in this case, Beatrice has already sold off or closed the following facilities which were found to be acquired unlawfully: Hawaii Brewing; Rawley Frozen Foods; Bakersfield, California; Pasadena, California (retail); Valleymaid Ice Cream; Eckles Ice Cream Co.; and Dahl-Cro-Ma. These seven plants accounted for $11.4 million or 20% of the premerger sales of the companies affected by the December order. We know from experience with the dairy industry that the dynamics of this industry and the constant changes in dairy ownership underscore the importance of achieving divestiture as quickly as possible.

titure of the southwest plants can be effected to a single purchaser, will be the establishment of a substantial, viable regional dairy company with sales of $36 million and profits of $1,137,000 in what is reported by our staff to be one of the fastest growing areas in the continental United States. It can be anticipated that the establishment of such a medium-size regional competitor and the elimination of Beatrice from the southwestern area will re-establish the forces of potential competition in this region, since Beatrice remains in northern Utah and in northern California.

In the view of a majority of the Commission the relief secured through this consent settlement is effective and indeed is in some respects more effective than the divestiture which might be ordered by a court because of the immediacy with which it can be implemented.

DISSENTING STATEMENT

By ELMAN, *Commissioner*:

There have been three recent Commission decisions designed to provide basic guidelines of law and policy in the field of conglomerate mergers: *Consolidated Foods Corp.,* Docket No. 7000 [62 F.T.C. 929], dealing with reciprocity: *Procter & Gamble-Clorox,* Docket No. 6901 [63 F.T.C. 1465], dealing with product-extension mergers; and *Beatrice Foods Co.,* Docket No. 6653, dealing with market-extension mergers. The first two went to the Supreme Court and resulted in affirmance of the Commission's decisions. The third is now terminated, while still pending for review in the Ninth Circuit, by acceptance of a consent order.

Today's action is taken by a vote of 2-1, with two members not participating. One of the two members of the Commission constituting the present majority did not participate in any way in the adjudicative proceedings before the Commission. In the recent *Proctor & Gamble-Folger* case (Docket C-1169, February 9, 1967) [p. 135 herein], where the Commission accepted a consent order

simultaneously with the issuance of the complaint, that commissioner stated as follows [pp. 143-147 herein]:

I do not believe that the Commission, having filed a complaint in which it had reason to believe that a challenged acquisition violated the law, should settle that complaint by consent unless the consent order adequately and fully removes the anticompetitive impact which the acquisition is believed to have engendered and provides the relief which the Commission could reasonably anticipate a court would direct. * * *

The law respecting the anticompetitive impact of conglomerate mergers has not yet been established. There is a great need to test and develop the case law in these areas. By its willingness to enter into consent orders and agreements, a majority of the Commission has prevented the development of case law dealing with such mergers that is so essential both to the law enforcement agency and to the businessman seeking to conform his conduct to the confines of the law.

Today's settlement does not come in advance of trial, before the allegations of the complaint have been tested, but after the case has already been fully tried and adjudicated by the Commission. This case—one of the most important ever brought in the merger field—involved a series of acquisitions made by respondent, the third largest dairy company in the United States, over an extended period of time. After proceedings lasting almost a decade, the Commission on April 26, 1965, determined, in a unanimous opinion, that a number of these acquisitions were illegal. When it announced its opinion, the Commission did not follow its usual procedure and issue a final order at the same time. Instead, because of the magnitude and complexity of the problems of relief, the Commission deferred entry of a final order pending receipt of the parties' views on the form and consent of an appropriate order. On December 10, 1965, after full consideration of the proposals submitted by complaint counsel and respondent, the Commission issued a final order, accompanied by an opinion examining in detail all of the factors bearing on the scope of the order. That order is now

set aside and replaced by a consent order having the approval of only two members of the Commission.

I shall not discuss the merits of the consent order, except to note that it falls substantially short of the relief which the Commission, after the most extensive and careful consideration, on the basis of the findings of fact in the record, determined to be necessary in order to redress the violations found. There is no reason to anticipate that the Commission's decision and order would not be sustained on review. It is most regrettable that the opportunity for such review has now been foreclosed by the action of a bobtailed Commission. Businessmen and the bar, as well as the antitrust enforcement agencies, would have benefited from a Supreme Court decision in this test case, settling the rules of law applicable to market-extension mergers.

MODIFIED ORDER

Beatrice Foods Co., having filed in the United States Court of Appeals for the Ninth Circuit on February 9, 1966, a petition to review and set aside the order of divestiture issued herein on December 10, 1965 [68 F.T.C. 1003]; and the Commission and Beatrice Foods Co., having subsequently agreed upon a plan of divestiture and upon the provisions of a final order modifying the order entered by the Commission on December 10, 1965; and the Court on May 23, 1967 [8 S.&D. 495], having issued its final decree affirming and enforcing said order as submitted by the Commission and Beatrice Foods Co.;

Now, therefore, it is hereby ordered, That the order of December 10, 1965, be, and it hereby is, modified in accordance with the final decree of the Court to read as follows:

It is ordered, That:

I

Beatrice Foods Co. ("Beatrice"), within a period not exceeding eighteen (18) months from the effective date of this order, unless extended, shall divest itself ab-

solutely and in good faith to a purchaser approved in advance by the Commission, of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at Pasadena, California (two plants); Cedar City, Utah, El Paso, Texas; Roswell, New Mexico; Albuquerque, New Mexico; all locations in the State of Arizona; and Morgantown, West Virginia, and which are engaged in the manufacturing, processing or distribution of pasteurized and homogenized milks, buttermilks, skim milks, cream, half & half, sour cream, cottage cheese, ice cream, ice milk, mellorine-type products, sherbet, or water ices, together with all assets, properties and businesses which are or may be used or conducted by Beatrice at or in conjunction with said plants, or added to said plants or utilized in replacement of said plants by Beatrice, as may be necessary to restore the properties as competitive entities, all as hereinafter provided.

Provided, however, That this order does not require that the plant, assets, properties and businesses located at Morgantown, West Virginia, be sold to the purchaser of the other plants, assets, properties and businesses described above.

Provided further, however, That if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.

As used in this order the term "assets, properties and businesses conducted by Beatrice at or in conjunction with said plants" shall include all dairy distribution stations and branches regardless of where located, which are owned in whole or in part by Beatrice or operated by Beatrice and supplied by any of said plants.

II

Such divestitures shall be effected subject to the following:

1. Upon the completion of such divestitures to the purchaser or purchasers (herein called the "transferee"), Beatrice, its officers, directors, agents, representatives, or employees shall not exercise any control or supervision over the policies, control, management, operation or acts of transferee, or any successor in interest to transferee: *Provided,* That where necessary for the successful operation of the business of the transferee, Beatrice may license for a limited period of time the use of any of its trademarks or trade names in the territory of the transferee subject to the prior approval by the Commission of each license and the terms thereof.

2. By these divestitures no interest shall be sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or directly or indirectly under the control or direction of Beatrice or any of Beatrice's divisions, subsidiaries or affiliated corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Beatrice without the prior approval of the Commission.

III

Beatrice shall cease and desist, for a period of ten (10) years from the effective date of this order from acquiring, directly or indirectly, any interest in any firm, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any State of the United States or in the District of Columbia in the business of manufacturing, processing or distributing at wholesale or on retail milk routes any of the products described in Paragraph I of this order, without the prior approval of the Commission.

IV

Beatrice shall submit to the Commission every ninety (90) days a report in writing setting forth its efforts and progress in carrying out the divestiture requirements of this order until all assets have been divested with the approval of the Commission; and Beatrice shall submit to the Commission on the first day of each calendar year a report in writing setting forth its compliance with the cease and desist provisions of this order.

V

Beatrice shall notify the Commission of the names and addresses of all persons, firms or corporations who shall express to Beatrice any interest in purchasing the plants, assets, properties or businesses to be divested under the terms of this order, within thirty (30) days after having been informed of such interest.

Commissioner Elman not concurring, and Commissioners MacIntyre and Reilly not participating.